

No. 89-1679-CFX  
Status: GRANTED

Title: Summit Health, Ltd., et al., Petitioners  
v.  
Simon J. Pinhas

Docketed:  
April 24, 1990

Court: United States Court of Appeals  
for the Ninth Circuit

Counsel for petitioner: Waxman, J. Mark

Counsel for respondent: Silver, Lawrence

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Entry	Date	Note	Proceedings and Orders
1	Apr 24 1990	G	Petition for writ of certiorari filed.
2	May 9 1990		Brief amicus curiae of California Association of Hospitals and Health Systems filed.
3	May 29 1990		DISTRIBUTED. June 14, 1990
4	May 31 1990	X	Brief of respondent Simon J. Pinhas in opposition filed.
5	Jun 18 1990		Petition GRANTED. limited to Question 1 presented by the petition. *****
7	Jul 18 1990		Order extending time to file brief of petitioner on the merits until August 10, 1990.
9	Aug 3 1990		Joint appendix filed.
10	Aug 10 1990		Brief amici curiae of Arizona Hospital Assn, et al. filed.
11	Aug 10 1990		Brief of petitioners Summit Health, Ltd., et al. filed.
12	Aug 21 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
14	Sep 5 1990		Order extending time to file brief of respondent on the merits until September 18, 1990.
15	Sep 7 1990		Record filed.
		*	Certified copy of original record, 2 boxes, received. (Vide 1889).
16	Sep 14 1990		Brief amici curiae of California, et al. filed.
17	Sep 18 1990		Brief amicus curiae of United States filed.
18	Sep 18 1990		Brief amicus curiae of Richard A. Bolt, M.D. filed.
19	Sep 18 1990		Brief of respondent Simon J. Pinhas filed.
20	Sep 26 1990		CIRCULATED.
21	Oct 9 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Souter OUT.
23	Oct 18 1990	X	Reply brief of petitioners Summit Health, Ltd., et al. filed.
22	Oct 19 1990		SET FOR ARGUMENT MONDAY, NOVEMBER 26, 1990. (3RD CASE)
24	Nov 7 1990		Record filed.
		*	Certified copy of C. A. Proceedings, box, received.
25	Nov 26 1990		ARGUED.

89-1679

Supreme Court, U.S.

FILED

APR 24 1990

JOSEPH F. SPANIOL, JR.  
CLERK

In the Supreme Court  
OF THE  
United States

OCTOBER TERM 1989

SUMMIT HEALTH, LTD., MIDWAY HOSPITAL MEDICAL  
CENTER, THE MEDICAL STAFF OF MIDWAY HOSPITAL  
MEDICAL CENTER, MITCHELL FELDMAN, AUGUST  
READER, M.D., ARTHUR N. LURVEY, M.D.,  
JONATHAN I. MACY, M.D., JAMES J. SALZ, M.D.,  
GILBERT PERLMAN, M.D., MARK KADZIELSKI  
and WEISSBURG and ARONSON, INC.,  
*Petitioners,*

vs.

SIMON J. PINHAS, M.D.,  
*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

J. MARK WAXMAN  
Counsel of Record  
TAMI S. SMASON  
WEISSBURG AND ARONSON, INC.  
2049 Century Park East  
Suite 3200  
Los Angeles, California 90067  
(213) 277-2223

*Attorneys for Petitioners*

*Summit Health, Ltd., Midway Hospital  
Medical Center, the Medical Staff of  
Midway Hospital Medical Center,  
Mitchell Feldman, August Reader, M.D.,  
Arthur N. Lurvey, M.D., Jonathan I.  
Macy, M.D., James J. Salz, M.D., Gilbert  
Perlman, M.D., Mark Kadzielski and  
Weissburg and Aronson, Inc.*

April 24, 1990

101P4



**QUESTIONS PRESENTED FOR REVIEW**

1. Whether a claim under Section 1 of the Sherman Act which fails to allege any nexus between the allegedly anticompetitive activity and interstate commerce nevertheless meets the jurisdictional requirements of the Sherman Act, as interpreted by this Court in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980)?
2. Whether allegations that an attorney provided legal assistance to a client are sufficient to assert that the attorney and client are co-conspirators under the Sherman Act?

## LIST OF PARTIES

The parties before the Court of Appeals included Simon J. Pinhas, M.D., Summit Health, Ltd., Midway Hospital Medical Center, the Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Richard E. Posell, Jonathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc.<sup>1</sup>

<sup>1</sup> Summit Health, Ltd. is the parent corporation of Midway Hospital Medical Center. There are no parent or non-wholly owned subsidiaries to be listed for Summit Health, Ltd. or Weissburg and Aronson, Inc.

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No.

# In the Supreme Court

OF THE  
**United States**

OCTOBER TERM 1989

SUMMIT HEALTH, LTD., MIDWAY HOSPITAL MEDICAL  
CENTER, THE MEDICAL STAFF OF MIDWAY HOSPITAL  
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READER, M.D., ARTHUR N. LURVEY, M.D.,  
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vs.

SIMON J. PINHAS, M.D.,  
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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
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Summit Health, Ltd., Midway Hospital Medical  
Center, the Medical Staff of Midway Hospital Medical  
Center, Mitchell Feldman, August Reader, M.D., Arthur  
N. Lurvey, M.D., Jonathan I. Macy, M.D., James J. Salz,  
M.D., Gilbert Perlman, M.D., Mark Kadzielski and  
Weissburg and Aronson, Inc., petition for a writ of certio-  
rari to review the decision of the United States Court of  
Appeals for the Ninth Circuit in this case.



## OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*) is reported at 894 F.2d 1024 (9th Cir. 1989).

## JURISDICTION

The opinion of the court of appeals issued on July 26, 1989, and was amended and superseded on January 25, 1990. Petitions for rehearing were filed by all parties, and were denied on January 25, 1990. (Appendix, *infra* at A-1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sherman Act § 1, 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

## STATEMENT OF THE CASE

In this case, a surgeon contends that a peer review action taken against his medical staff privileges at Midway Hospital Medical Center, an acute care hospital located in Los Angeles, California, was based on false charges of deficient quality of care, which were the product of an antitrust conspiracy. Although the peer review action was determined to have been based on substantial evidence by a Superior Court of the State of California ruling upon the surgeon's petition for a writ of mandate (Appendix, *infra*), the physician contends, *inter alia*, that the Hospital, its parent corporation, the physicians in-

involved in the peer review process, and the Hospital's attorneys "conspired" against him in violation of Section 1 of the Sherman Act. On October 9, 1987, the District Court entered its order granting defendants' motion to dismiss the first amended complaint without leave to amend (Appendix, *infra*).

The Ninth Circuit reversed the antitrust holding of the district court. The circuit court held that general allegations that the plaintiff and each of the defendants are "engaged in interstate commerce" are sufficient to invoke jurisdiction under Section 1 of the Sherman Act, notwithstanding the fact that the plaintiff did not allege any nexus between the alleged conspiracy and interstate commerce. The circuit court also held that the first amended complaint, which does not allege that the Hospital's attorneys did anything other than provide legal advice requested of them, was nevertheless sufficient to state a claim against the Hospital's counsel, Mr. Kadzielski and Weissburg and Aronson, Inc., for conspiring with their clients in violation of Section 1 of the Sherman Act.

## REASONS FOR GRANTING REVIEW

### I.

**THERE IS A CLEAR CONFLICT AMONG THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION, AS TO THE SHERMAN ACT'S INTERSTATE COMMERCE JURISDICTIONAL REQUIREMENTS.**

### A. Introduction

At issue in this action is the appropriate interpretation of this Court's opinion in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), setting the standard

for the interstate commerce requirement for Sherman Act jurisdiction. The position adopted by the First, Second, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeal is that the allegedly anticompetitive activity, if it is local in nature, must affect interstate commerce. The minority position, expressed by the Ninth Circuit Court of Appeals in this case, is that the allegedly anticompetitive activity need not affect interstate commerce. Instead, the minority holds that Sherman Act jurisdiction can be invoked if the general business activities of the defendants are alleged to have a not insubstantial effect on interstate commerce.

The Court should resolve this conflict because its importance to hospitals, physicians, and the public, which benefits from effective medical staff peer review, is growing as an increasing number of disciplined physicians who are the subject of peer review proceedings have been asserting Sherman Act claims against those involved in the process. As at least one circuit has recognized, the minority position would allow "virtually every physician who is ever temporarily denied hospital privileges for whatever reason [to] drag the hospital and members of its staff into costly antitrust litigation...." *Seglin v. Esau*, 769 F.2d 1274, 1283-1289 (7th Cir. 1985).<sup>2</sup>

### B. The Decision Below

Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies "in restraint of trade or commerce among the several States..." 15 U.S.C. § 1.

<sup>2</sup>*Cf.* The Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 ("The Congress finds... (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.")

To invoke Sherman Act jurisdiction, a plaintiff must allege that "the defendants' activity is itself in interstate commerce, or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980). The issue raised by the opinion below is whether the alleged nexus with interstate commerce must be with the general business activity of the defendants or with the alleged conspiracy in restraint of trade.

In his first amended complaint, the plaintiff asserted only in the most general terms that he "has" engaged in interstate commerce and that the defendants were "engaged in interstate commerce." (Appendix, *infra*, paragraphs 5-17 of the first amended complaint.) He failed to allege any nexus between the alleged unlawful conduct itself and interstate commerce.

The circuit court rejected the contention of petitioners that a Sherman Act plaintiff is required to allege a nexus between the alleged conspiracy and interstate commerce. Recognizing that this Court's decision in *McLain* requires a Sherman Act plaintiff to show that as a matter of practical economics the "activities" of Sherman Act defendants have a "not insubstantial effect on the interstate commerce involved," the circuit court in this case held that the "activities" in question are "the peer review process in general," and not the alleged conspiracy. 894 F.2d at 1032. The opinion in this case illustrates the Ninth Circuit's interpretation that the "activities" this Court referred to in *McLain* are the defendants' general business activities, independent of the alleged violation. See *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.) *cert. denied*, 449 U.S. 869 (1980); *Mitchell v. Frank R. Howard Memorial*



*Hospital*, 853 F.2d 762 (9th Cir. 1988) *cert. denied*, 109 S.Ct. 1123 (1989). This interpretation has been roundly criticized and rejected by a majority of the Circuit Courts of Appeal.<sup>3</sup>

### C. The Split Among The Circuits

The Ninth Circuit's interpretation of *McLain* has been criticized and rejected by a majority of circuits. The Tenth Circuit, *en banc*, evaluated *McLain* in detail and concluded that "we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus, assessed in practical terms, between interstate commerce and the challenged activity." *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 724 (10th Cir. 1980) (*en banc*).

The Tenth Circuit's analysis of *McLain* has been accepted by the First, Second, Sixth, Seventh, and Eighth circuits. *Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank*, 649 F.2d 36, 44-45 (1st Cir. 1981); *Furlong v. Long Island College Hospital*, 710 F.2d 922, 925-926 (2nd Cir. 1983); *Hayden v. Bracy*, 744 F.2d 1338, 1342-1343 (8th Cir. 1984); *Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985); *Stone v. William Beaumont Hospital*, 782 F.2d 609, 613-614 (6th Cir. 1986); *Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411, 417 (7th Cir. 1986); *Sarin v. Samaritan Health Center*, 813 F.2d 755, 758 (6th Cir. 1987); see also *Thompson v. Wise General Hospital*, 707 F. Supp. 849, 855 (W.D. Va. 1989) ("in the absence of any Fourth Circuit ruling on this issue, the court

<sup>3</sup>The minority interpretation has also been criticized by commentators. See, e.g., P. Areeda, ANTITRUST LAW ¶ 232.1, at 238-239 (Supp. 1989)

adopts the approach of the majority of the circuits") *aff'd*, 896 F.2d 547 (4th Cir. 1990).<sup>4</sup>

Representative of such holdings, and perhaps most analogous to this case, is the decision of the Seventh Circuit in *Seglin v. Esau*. In *Seglin*, the Seventh Circuit found that the allegations of purchase of equipment and supplies in interstate commerce, the provision of services to patients who traveled in interstate commerce and the receipt of payments in interstate commerce coupled with an allegation of suspension from a medical staff for approximately sixteen months were insufficient to meet the interstate commerce pleading requirements of the Sherman Act. While the Seventh Circuit did not say that the suspension or denial of one physician's hospital privileges could never state an antitrust claim, it was "incumbent" upon the plaintiff to plead additional facts from which it could be inferred that the alleged unlawful conduct itself somehow affected interstate commerce.

Notwithstanding the complete lack of sufficient pleading allegations in the present case, the Ninth Circuit concluded that the plaintiff "need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce." 894 F.2d at 1032.<sup>5</sup> No case so

<sup>4</sup>Two circuits apparently join the Ninth Circuit in the minority opinion. See *Cardio-Medical Assocs. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68, 74-75 (3rd Cir. 1983); *Shahawy v. Harrison*, 778 F.2d 636, 639-640 (11th Cir. 1985) *amended*, 790 F.2d 75 (1986).

<sup>5</sup>This conclusion is unsupported by any factual record or pleading allegation. The plaintiff in this case did not allege that the mere existence of a peer review proceeding, as a matter of "practical economics," had a not insubstantial effect on interstate commerce. The *only* interstate commerce allegations are that the various parties

holds, and the overwhelming weight of opinion is to the contrary. *See, e.g., Sarin v. Samaritan Health Center*, 813 F.2d at 758; *Seglin v. Esau*, 769 F.2d at 1280. Moreover, whether or not peer review proceedings have an effect on interstate commerce, there is no allegation that the specific conduct alleged in this case, *i.e.*, the creation of false charges of deficient quality of care, has any nexus with interstate commerce. Accordingly, the circuit court's interstate commerce holding is inconsistent with the holdings of a majority of circuit courts of appeals.

#### D. The Importance of the Issue

The decision below is the most recent in the minority line of cases failing to require any nexus between the alleged anticompetitive conduct and interstate commerce. The Seventh Circuit recognized the adverse policy and practical consequences of applying the minority jurisdictional rule in a medical staff peer review case:

Failure to uphold the dismissal of the instant complaint on the ground of lack of any allegations regarding a plausible nexus with interstate commerce would mean that virtually every physician who is ever temporarily denied hospital privileges for whatever reason could drag the hospital and members of its staff into costly antitrust litigation merely by alleging that the defendant receives payments, goods, or equipment in interstate commerce. We decline to encourage this procedure.

*Seglin*, 769 F.2d at 1283-1284.

It has been recognized that the minority approach "would in essence eliminate the interstate commerce test

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are or have been engaged in interstate commerce. (Appendix, *infra*, ¶¶ 5-17 of the first amended complaint.)

from antitrust law, since the total activities of virtually any defendant, no matter how local its business, are likely to have some effects upon interstate commerce. [citation]" *Stone*, 782 F.2d at 618, n. 3 (Holschuh, D. J., concurring).

The inconsistent jurisdictional findings spawned by the split among the circuits are contrary to the national purpose of the Sherman Act, which is to promote uniform antitrust treatment of interstate commerce. This purpose will not be promoted if the invocation of Sherman Act jurisdiction varies according to the precedential boundaries of circuit courts of appeal rather than uniform standards of enforcement.



## II.

**THE CIRCUIT COURT HOLDING IMPINGES ON THE EFFECTIVE ASSISTANCE OF COUNSEL TO THOSE CONDUCTING PEER REVIEW, AND WILL CREATE A CHILLING EFFECT ON THE PEER REVIEW PROCESS AND ITS PARTICIPANTS.**

**A. Introduction**

This Court has not addressed the prerequisites to a finding of conspiracy between an attorney and his client. In this case, there are no allegations that the attorneys had any independent economic interest in the outcome of the peer review proceedings, or were themselves in competition with the plaintiff. The allegations consist of assertions that the lawyers acted as lawyers, providing the legal advice requested of them. This is a far cry from the allegations necessary to overcome this Court's holding that two people or entities which "are not separate economic actors pursuing separate economic interests . . . do not provide the plurality of actors imperative for a § 1 conspiracy." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

The circuit court in this case nevertheless held that the pleading, which alleged that the lawyers provided legal advice to their clients, was sufficient to state a claim against Mr. Kadzielski and Weissburg and Aronson, Inc., the Hospital's attorneys. If this decision is allowed to stand, it will have a devastating effect on the peer review process. The participants in any peer review process legitimately will be concerned that antitrust claims will be created solely by the fact that counsel was retained to provide assistance, even without an allegation that the

lawyers had a separate economic interest.<sup>6</sup> This will create a chilling effect on: (a) the retention of legal counsel, who might provide objective advice regarding the potential antitrust or tort implications of the conduct at issue; and (b) reasoned communication with legal counsel, because such communications may become targets of discovery in subsequent antitrust proceedings.

**B. The Underlying Allegations**

The salient Sherman Act conspiracy allegations are set forth in paragraph 124 of the first amended complaint which alleges:

... in late March, 1987 [defendants] Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz and Dr. Perlman entered into a combination and a conspiracy to retaliate against Dr. Pinhas and to preclude him from continued competition in the market place . . . [i]n furtherance of the conspiracy of defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz and Dr. Perlman, defendants *enlisted the assistance and received the assistance of [the hearing officer], Mr. Kadzielski and [Weissburg and Aronson]* to create unjustified charges, to secure adverse determinations against plaintiff, Dr. Pinhas, to cause a summary suspension and termination of his privi-

<sup>6</sup>*Cf.* Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, in *Bolt v. Halifax*, 981 F.2d 810 (11th Cir. 1990) *petition for cert. filed*, 58 U.S.L.W. 3598 (U.S. Mar. 9, 1990) (No. 89-1419), which presents for review the question whether, in the context of state-mandated peer review, a hospital can be considered as separate from its own medical staff, for purposes of antitrust conspiracy analysis.

leges at Midway Hospital and report that summary suspension and termination to the defendant BMQA, and causing dissemination of that adverse determination to hospitals in which Dr. Pinhas is a member, and to all hospitals to which he may apply so as to secure similar actions by those hospitals, thus effectuating a boycott of Dr. Pinhas.

First amended complaint, paragraph 124 (Appendix, *infra*.)

There is no allegation that the attorneys provided anything other than the legal assistance requested, or had any economic interest independent of that of their clients. See *Copperweld*, 467 U.S. at 769 (Section 1 conspiracy requires separate economic actors pursuing separate economic interests); *Potters Medical Center v. City Hospital Ass'n.*, 800 F.2d 568 (6th Cir. 1986) (agent without independent personal stake not capable of conspiring with hospital); see also *Weiss v. York Hospital*, 745 F.2d 786 (3rd Cir. 1984) *cert. denied*, 470 U.S. 1060 (1985). In short, there is no allegation that the role of counsel was anything other than that of a legal adviser assisting clients with their statutory obligations in the peer review process. See *Ashley Meadows Farm v. American Horse Shows Association*, 1983-2 Trade Cases ¶ 65,653, at 69353-69354 (S.D.N.Y. Sep. 29, 1983) ("Zealous" participation of counsel in disciplinary proceedings insufficient for antitrust liability.)<sup>7</sup>

<sup>7</sup>While it is recognized that the generalized allegation is made that counsel "caused" the commencement and prosecution of peer review proceedings, that allegation must be read in light of the specific factual claims asserted in the antitrust claim made by the plaintiff. Compare first amended complaint, ¶¶ 18 and 124 (Appendix, *infra*).

### C. The Importance of the Issue

If the circuit court's decision is allowed to stand, it will have a devastating effect on those who would consult with counsel in the pursuit of an appropriate peer review process. Plaintiffs will make antitrust defendants of counsel who assist at any stage of the peer review process. This will create a tremendously chilling effect on the peer review process and its non-attorney participants because they will have a legitimate concern that the mere consultation with legal counsel will subject them to Sherman Act liability, and that any attorney-client communications will be discoverable in subsequent antitrust proceedings. Thus, attorneys who might otherwise counsel *against* antitrust violations may not even be consulted.

By virtue of the strong public policy favoring the ability of counsel to provide legal advice to their clients, courts should require a particularized allegation that counsel had a separate economic interest, and were separate economic actors, and find that assertions that counsel were enlisted to provide assistance are inadequate to state a viable antitrust claim.<sup>8</sup>

<sup>8</sup>The particularized pleading requirement has been recognized by the California Legislature as reflecting an important public policy. This policy is now embodied in Cal. Civ. Code § 1714.10 (West Supp. 1990) requiring preliminary court review prior to acceptance for prosecution of a pleading asserting causes of action against attorneys based on a civil conspiracy with their clients.



## CONCLUSION

The circuit court's opinion will perpetuate the inconsistent interpretation of this Court's opinion in *McLain*, resulting in arbitrary and unpredictable invocation of Sherman Act jurisdiction. The circuit court's holding that an attorney and his client are co-conspirators under the Sherman Act, based solely on an allegation that an attorney provided requested legal advice, is contrary to the Sherman Act conspiracy requirements, is contrary to public policy and creates a chilling effect on the peer review process. For these reasons, petitioners request that the Court accept review and reverse the decision below.

Respectfully submitted,

J. MARK WAXMAN  
TAMI S. SMASON  
WEISSBURG AND ARONSON, INC.,  
2049 Century Park East  
Suite 3200  
Los Angeles, California 90067  
(213) 277-2223

*Attorneys for petitioners*

*Summit Health, Ltd., Midway Hospital Medical Center, the Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Jonathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Mark Kadzielski and Weissburg and Aronson, Inc.*

SIMON J. PINHAS, *Plaintiff-Appellant*,

v.

SUMMIT HEALTH, LTD.; MIDWAY HOSPITAL MEDICAL CENTER; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER; MITCHELL FELDMAN, ET AL.,  
*Defendants-Appellees.*

No. 87-6530.

United States Court of Appeals,  
Ninth Circuit.

Argued and Submitted Feb. 7, 1989.

Decided July 26, 1989.

As Amended on Denial of Rehearing and  
Rehearing En Banc Jan. 25, 1990.

Physician whose hospital staff privileges were revoked brought antitrust action. United States District Court for the Central District of California, Ferdinand F. Fernandez, J., dismissed complaint, and appeal was taken. The Court of Appeals, Wiggins, Circuit Judge, held that: (1) state action doctrine did not protect peer-review proceedings from application of antitrust laws, and (2) peer-review proceeding did not deprive physician of due process absent showing of state action.

Affirmed in part, reversed in part, and remanded.

Opinion, 880 F.2d 1108, superseded.

### 1. Federal Courts — 776

Dismissal for failure to state claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is ruling on question of law that Court of Appeals reviews de novo; review is limited to contents of complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

## 2. Declaratory Judgment — 393

Customery deference for district court is not applicable to its determination to grant declaratory judgment; Court of Appeals must exercise its own sound discretion to determine propriety of district court's grant or denial of declaratory relief.

## 3. Monopolies — 12(15.5)

State action doctrine did not shield California hospital's peer-review proceedings from antitrust challenge absent showing that proceedings were actively supervised by state; state agencies did not actively supervise peer-review procedures and judicial review was insufficient to constitute active supervision.

## 4. Federal Courts — 13

Physician's antitrust suit against hospital, challenging peer-review procedure, was ripe, though peer-review proceedings were not yet completed when suit was filed, in that physician had already lost staff privileges and report of such loss had already been filed with state. West's Ann. Cal.Bus. & Prof.Code § 805.

5. Administrative Law and Procedure — 229  
Monopolies — 24(1)

Physician challenging hospital peer-review process on antitrust grounds was not required to first exhaust administrative remedies; where there was no statutory requirement of exhaustion of administrative remedies, application of exhaustion doctrine lay within discretion of trial court.

6. Administrative Law and Procedure — 228  
Monopolies — 28(3)

Doctrine of primary jurisdiction did not preclude review of physician's antitrust suit against hospital, though physician was currently seeking review by state of hospital's peer-review decision; proceedings at state level, designed to determine whether physician had received fair hearing, would not help clarify and narrow his antitrust claims.

## 7. Federal Courts — 47

*Burford* abstention was not appropriate in physician's antitrust suit against hospital; application of federal antitrust law did not involve difficult questions of state law.

## 8. Commerce — 62.14

Physician alleging that peer-review proceedings which deprived him of staff privileges violated antitrust laws sufficiently alleged required nexus with interstate commerce; hospital was engaged in interstate commerce and peer-review proceedings affected hospital's entire staff.

## 9. Monopolies — 12(11)

Physician alleging that hospital's denial of his staff privileges violated antitrust laws sufficiently alleged adverse effect on competition; physician alleged that he provided services to patients at lower prices, and thus his exclusion from market would injure competition by allowing other similar doctors to charge higher prices for their services.



## 10. Attorney and Client — 26

Attorney is not immune from antitrust liability if he becomes active participant in formulating policy decisions with his client to restrain competition.

## 11. Conspiracy — 18

Physician's complaint, alleging that hospital's denial of his staff privileges violated antitrust laws, sufficiently alleged antitrust conspiracy; complaint alleged that hospital and its parent corporation conspired with their attorneys and medical staff to exclude him. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

## 12. Constitutional Law — 296(1)

## Hospitals — 6

Hospital's peer-review process did not violate physician's due process rights absent showing of state action; though peer-review process was statutorily mandated, decision to remove physician's staff privileges was made by private parties according to professional standards that were not established by state. U.S.C.A. Const. Amend. 14.

## 13. Declaratory Judgment — 300

Defendants in physician's antitrust suit against hospital which removed his staff privileges were not appropriate parties to defend physician's additional constitutional challenge to state and federal statutes requiring hospital to report its actions to government agencies. Health Care Quality Improvement Act of 1986, §§ 423, 425, 42 U.S.C.A. §§ 11133, 11135; West's Ann.Cal.Bus. & Prof.Code § 805.

Lawrence Silver, Beverly Hills, Cal., for plaintiff-appellant.

J. Mark Waxman, Weissburg and Aronson, Inc., Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before CANBY, WIGGINS and O'SCANNLAIN, Circuit Judges.

WIGGINS, Circuit Judge:

Appellant Dr. Simon J. Pinhas appeals the dismissal of his action challenging the removal of his staff privileges at Midway Hospital Medical Center (Midway) in Los Angeles. Pinhas alleges claims under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1982) and 42 U.S.C. §§ 1983, 1985(3) (1982). Pinhas also seeks a declaratory judgment that Cal.Bus. & Prof.Code §§ 805, 805.5 (West Supp.1989), and the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152 (Supp. IV 1986), are unconstitutional under the fourteenth amendment. The district court granted appellees' motion to dismiss all four claims. We reverse the dismissal of the antitrust claim, and affirm the dismissal of the section 1983 claim and request for declaratory judgment.<sup>1</sup>

## I

## BACKGROUND

Dr. Pinhas is an eye physician and ophthalmological surgeon. He became a member of the medical staff at Midway in October 1981. Reimbursement under Medicare

<sup>1</sup>Pinhas does not challenge the dismissal of the section 1985(3) claim on appeal.

for the charges of an assistant surgeon in the performance of eye surgery became unavailable in February 1986. Pinhas alleges that most hospitals in Los Angeles subsequently eliminated their requirement that assistant surgeons be utilized during eye surgeries. Pinhas, together with several other ophthalmic surgeons at Midway, petitioned the medical staff at Midway to eliminate its assistant surgeon requirement. The medical staff refused to do so. Pinhas advised the hospital administration that the medical staff's refusal to eliminate the assistant surgeon requirement would cost him approximately \$60,000 per year. Pinhas allegedly told the hospital that although he wished to keep the majority of his practice at Midway, he would nevertheless move his practice if the assistant surgeon requirement was not abolished. Pinhas alleges that rather than abolish the assistant surgeon requirement, Midway offered him what he characterizes as a "sham" contract in which he was to be paid the sum of \$36,000 per year (later raised to \$60,000 per year) for consulting services he contends he would not have been expected to perform. Pinhas refused to sign the contract. Despite repeated requests by appellees Dr. Lurvey, the Chief of Staff at Midway, and Mitchell Feldman, regional vice-president of Summit Health Ltd. (Summit), the parent corporation of Midway, Pinhas refused to return the contract.

Pinhas contends that as a result of his refusal to return the contract, Lurvey and Feldman conspired to initiate disciplinary proceedings against him. By letter dated April 13, 1987, Pinhas was advised by Summit Health and Midway, through Lurvey and Feldman, that he was summarily suspended as of that date. The letter stated that he was being suspended based on a "medical staff review of Dr. Pinhas's medical records with consideration as to the questions raised regarding: indications for surgery; ap-

propriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." The letter also indicated that the Midway Executive Committee (MEC) would convene within ten days to review and consider the action. The MEC met on April 20, 1987, and permitted Pinhas to make a statement. The MEC upheld the summary suspension with the recommendation to terminate his staff privileges at Midway. Midway's board of directors concurred with the MEC's recommendation.

In accordance with the medical staff by-laws, Pinhas requested a hearing by the Midway Judicial Review Committee (JRC). He was granted the hearing and received notice of seven charges against him. In accordance with the bylaws, Lurvey appointed seven members of the medical staff to serve on the JRC. Attorney Richard Posell was selected by Midway's attorney Mark Kadzielski of Weissburg & Aronson to serve as the hearing officer. The peer-review hearings began on May 26 and proceeded for six hearing sessions, concluding on June 12, 1987. Both parties were permitted to call witnesses and introduce evidence. Pinhas was not permitted representation by legal counsel prior to or during the proceedings. The JRC issued its report on June 12, 1987, upholding only one of the seven charges against Pinhas. It recommended that Pinhas be reinstated subject to Pinhas's agreement to several special conditions relating to the conduct of his operations and to be placed on a six-month probationary period.

The MEC and Pinhas both appealed the JRC's decision to the Governing Board of the hospital in July 1987. On February 2, 1988, the Governing Board affirmed the decision of the JRC, but imposed more stringent conditions upon Pinhas's six-month probationary period. Fi-



nally, sometime in October 1988, Pinhas filed a petition for writ of mandate pursuant to Cal.Civ.Proc.Code § 1094.5 (West Supp.1989). No decisions has yet been reached in that matter.

On May 21, 1987, following his suspension, but before the hearing before the JRC, Pinhas filed this suit in federal court. Named as defendants are Summit Health; Midway; the Midway medical staff; Dr. Lurvey; Feldman; Drs. Reader, Macy, Salz, and Perlman, each of whom are ophthalmologists and competitors of Pinhas; Peggy Farber, an employee in the risk management section with Summit Health/Midway; Kadzielski; Weissburg & Aronson; and Posell (collectively "appellees").<sup>2</sup> Pinhas alleges in his complaint that as a result of his refusal to sign the "sham" contract, appellees entered into a conspiracy to preclude him from practicing at Midway or any other hospital in California or the rest of the United States in violation of section one of the Sherman Act, 15 U.S.C. § 1 (1982). The thrust of Pinhas's antitrust claim is that appellees conspired summarily to suspend and terminate his medical staff privileges at Midway, and to have the report of his termination disseminated to hospitals in California pursuant to Cal.Bus. & Prof.Code §§ 805, 805.1 (West Supp.1989), and to hospitals throughout the entire country pursuant to 42 U.S.C. §§ 11133, 11135 (Supp. IV 1986) in order to preclude him from practicing elsewhere. Section 805 of the California Business and Professions Code requires a health care facility to report actions adversely affecting a doctor's clinical privileges to the California Board of Medical Quality Assurance (BMQA). Before granting or renewing a staff privilege for a physi-

<sup>2</sup>Also named as a defendant was the California Board of Medical Quality Assurance (BMQA). BMQA, however, was dismissed by stipulation.

cian or surgeon, a health care facility is also required under section 805.5 to request a report from BMQA to determine whether the applying doctor has been denied staff privileges by another hospital.<sup>3</sup> Similar reporting requirements are mandated by federal law under 42 U.S.C. §§ 11133, 11135. Pinhas contends that as a result of his termination and the dissemination of the reports, appellees have effectively boycotted his practice and precluded him from continued competition in the marketplace.

Pinhas also alleges under sections 1983 and 1985(3) that the peer-review proceedings did not comport with the due process guarantee of the fourteenth amendment. In support of his due process claim, Pinhas contends he did not receive adequate notice of the charges against him, he was not permitted legal counsel at the hearing, the hearing officer Posell was biased, he was not permitted to cross-examine the MEC's witnesses and was precluded from calling several of his own. In addition to his antitrust and civil rights claims, Pinhas requests a declaratory judgment that Cal.Bus. & Prof.Code §§ 805, 805.1 and 42 U.S.C. §§ 11133, 11135 violate the equal protection and due process clauses of the fourteenth amendment.

Appellees filed a motion to dismiss on August 4, 1987, and the court dismissed the case on September 21, 1987. The district court concluded that the appellees were protected from antitrust liability under the state action doctrine pursuant to *Patrick v. Burget*, 800 F.2d 1498 (9th Cir.1986), *rev'd*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). The court dismissed the civil rights

<sup>3</sup>Failure to file a report under section 805, or to request one under section 805.1, constitutes a misdemeanor. Cal.Bus. & Prof.Code §§ 805(e), 805.5(c).

claims because of a lack of state action under the fourteenth amendment. It dismissed the claim for declaratory relief as not ripe, and also because the appellees were not the right parties to defend either the state or federal statute. Pinhas's request for reconsideration by the court based on the filing of certiorari with the Supreme Court in *Patrick* was denied. Pinhas appeals dismissal of his antitrust and section 1983 claims, as well as his request for declaratory relief. He does not appeal the dismissal of his section 1985(3) claim. We have jurisdiction under 28 U.S.C. § 1291 (1982).

## II

### STANDARD OF REVIEW

[1] A dismissal for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) is a ruling on a question of law that we review de novo. *See Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir.1984). Review is limited to the contents of the complaint, *see id.*, and the complaint should not be dismissed under the rule "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *see also Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir.1986), *cert. denied*, 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987).

[2] "The customary deference for the district court is not applicable to its determination to grant a declaratory judgment. The court of appeals must exercise its own sound discretion to determine the propriety of the district court's grant or denial of declaratory relief." *United States v. Washington*, 759 F.2d 1353, 1356-57 (9th Cir.) (en banc) (citations omitted), *cert. denied*, 474 U.S. 994, 106 S.Ct. 407, 88 L.Ed.2d 358 (1985); *accord Guerra v.*

*Sutton*, 783 F.2d 1371, 1376 (9th Cir.1986) (the court reviews the denial of declaratory relief de novo).

## III

### ANALYSIS

#### A. Antitrust Claim

Pinhas contends on appeal that the district court's dismissal of his antitrust claim based on the state action doctrine must be reversed in light of the Supreme Court's recent decision reversing our decision in *Patrick*. *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). Appellees contend that the Supreme Court's decision in *Patrick* does not alter the district court's holding, but that even if the state action doctrine does not apply, Pinhas's amended complaint does not state a viable antitrust claim because Pinhas's claim was not ripe for determination and the complaint fails to demonstrate the required nexus with interstate commerce, plead sufficient facts to establish injury to competition, and adequately plead an antitrust conspiracy.

##### 1. State Action

###### a. *Patrick*

In *Patrick* we considered whether the state action doctrine protected physicians in Oregon from federal antitrust liability for their involvement with hospital peer-review proceedings. The facts in *Patrick* are similar to those of this case. The plaintiff, a general and vascular surgeon, was subjected to a review of his staff privileges at a hospital in Astoria, Oregon, whereupon it was recommended that his privileges be terminated. 800 F.2d at 1502. The doctor brought suit in federal court while the hospital's peer-review proceedings were still being con-



ducted, alleging claims under sections 1 and 2 of the Sherman Act. *Id.* at 1504. He alleged that the members of his former clinic initiated the hospital peer-review proceedings to preclude him from competing against them. *Id.* at 1502-04. We held that the doctors' conduct in the peer-review proceedings was immune from antitrust scrutiny under the state action doctrine because Oregon had articulated a policy in favor of peer review and actively supervised the peer-review process. 800 F.2d at 1505-07. The Supreme Court reversed our decision, holding that the state action doctrine did not shield the hospital peer-review proceedings from an antitrust challenge. 108 S.Ct. at 1665-66.

In considering the state action doctrine, the Court applied the rigorous two-prong test first devised in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). *Patrick*, 108 S.Ct. at 1662-63. Under the *Midcal* test, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy,'" and "the anti-competitive conduct 'must be 'actively supervised' by the State itself.'" *Id.* 108 S.Ct. at 1663 (quoting *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943). The Court found it unnecessary to consider the "clear articulation" prong of the *Midcal* test, finding that the second prong was not satisfied. *Id.*

The Court stated that the "active supervision" or second requirement, "mandates that the State exercise ultimate control over the challenged anticompetitive conduct," and "requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.* The defendants argued that the state of Oregon actively supervised the peer-review pro-

cess through (1) the state Health Division; (2) the Board of Medical Examiners (BOME); (3) and the state judicial system. *Id.* The Court had little difficulty in concluding that neither the Health Division nor the BOME actively supervised the peer-review decisions. *Id.* 108 S.Ct. at 1663-64. The Health Division had general supervisory powers over such matters as licensing hospitals and the endorsement of health laws. Although the statute authorizes the Health Division to compel a hospital to meet its obligation to establish and review peer-review procedures, the Court concluded that this authority was insufficient because the Health Division had no power to review actual peer-review decisions and overturn a decision that failed to accord with state policy. *Id.* at 1664. Similarly, the BOME, whose principal function was to regulate the licensing of physicians, also lacked the authority to disapprove individual peer-review decisions. *Id.*

With respect to the state judiciary, the Court declined to decide whether judicial review of private conduct can ever satisfy the active supervision requirement. "This case, however, does not require us to decide the broad question whether judicial review of private conduct ever can constitute active supervision, because judicial review of privilege-termination decisions in Oregon, if such review exists at all, falls far short of satisfying the active supervision requirement." *Id.* at 1664-65. The Court noted that there was no statute in Oregon, or any holding by a state court, which provided a physician whose privilege had been revoked by a hospital a means of judicial review of private peer-review decisions. *Id.* at 1665. The Court emphasized that any judicial review that did exist was insufficient to constitute "active supervision," because the review would not involve a review of the merits of a privilege termination decision. *Id.* (citing *Straube v. Emanuel Lutheran Charity Bd.*, 287 Or. 375, 384, 600 P.2d

381, 386 (1979), *cert. denied*, 445 U.S. 966, 100 S.Ct. 1657, 64 L.Ed. 2d 242 (1980)). The Court thus concluded that no state actor in Oregon actively supervised hospital peer-review decisions and that the state action doctrine was inapplicable. *Id.*

b. *Application of Patrick*

[3] Because we conclude that the second prong of the *Midcal* test is not satisfied, we have no need to address its "clear articulation" prong. *Patrick*, 108 S.Ct. at 1663. Appellees' arguments in support of their contention that California actively supervises the peer-review process mirror those made in *Patrick*. Appellees contend that the State Department of Health Services (SDHS), California Board of Medical Quality Assurance (BMQA), and the state judiciary all actively supervise the peer-review system.

The SDHS has substantively the same role in California as the Oregon State Health Division has in Oregon: the licensure and review of hospital procedures, including procedures for the review of staff decisions.<sup>4</sup> Also like the Oregon State Health Division, it has no authority to review privilege decisions and therefore does not actively supervise these procedures.

Similarly, the BMQA serves relatively the same role in California as the BOME in Oregon. Its primary function is the regulation and disciplining of physicians. *See* Cal.Bus. & Prof.Code §§ 2001-2006 (West Supp.1989). And, as in Oregon, any adverse action taken by a hospital agreement against a member physician must be reported

<sup>4</sup> Pursuant to its rule-making authority under Cal. Health & Safety Code § 1275, the SDHS has promulgated extensive regulations governing the operation of an acute care facility. *See* Cal.Admin.Code tit. 22, § 70701 *et seq.* (1982).

to the BMQA. *See* Cal.Bus. & Prof. Code § 805 (West Supp.1989). Also like the BOME, the BMQA has no authority to review the outcome of a peer review proceeding. Although it may not disseminate a report it finds to be without merit, this restriction does not constitute the type of active supervision necessary under *Patrick*.

We join the Supreme Court in avoiding the broad question whether state courts, acting in their judicial capacity, ever can adequately supervise private conduct for purposes of the state action doctrine. *See Patrick*, 108 S.Ct. at 1664-65. The judicial review that does exist in California does not satisfy the active supervision requirement.

Unlike Oregon, California is actively engaged in reviewing peer-review decisions. Such review is created by statute under Cal.Civil Proc.Code § 1094.5 (West Supp. 1989) (reviewing quasi-judicial decisions) and Cal.Civ.Proc.Code § 1085 (West 1980) (reviewing quasi-legislative administrative proceedings).<sup>5</sup> The plethora of cases cited by appellees demonstrate the willingness of California courts to entertain challenges to the peer-review process. The function of the trial and appellate

<sup>5</sup> California law recognizes two types of mandamus review of the decisions made by hospitals with regard to physician medical staff privileges. Where a physician's medical staff privileges have been denied, suspended or terminated on the ground the physician has not demonstrated an ability to comply with established standards, that administrative decision is classified as "quasi-judicial" and review is by administrative mandamus. However, where the physician has had privileges denied or curtailed because of the implementation of a "policy" of the hospital, the administrative action is classified as "quasi-legislative" and reviewable by traditional mandamus.

*Hay v. Scripps Memorial Hosp.-La Jolla*, 183 Cal.App.3d 753, 758, 228 Cal.Rptr. 413, 417 (1986) (citations omitted).



courts, however, is limited under both types of proceedings.

[Under Section 1094.5,] if the decision was substantively rational, lawful, not contrary to established public policy and the proceedings were fair, a court may not substitute a judgment for that of the governing board even if it disagrees with the board's decision. The scope of review in traditional mandamus proceedings [under section 1085] is limited to an examination of the record of the hospital proceedings to determine whether the action taken was substantively irrational, unlawful or contrary to established public policy or procedurally unfair.

*Hay v. Scripps Memorial Hosp.-La Jolla*, 183 Cal.App.3d 753, 758, 228 Cal.Rptr. 413, 417 (1986) (citations omitted). This limited form of review is similar to the standards applied by the Oregon courts that the Supreme Court found insufficient to constitute active supervision. *Patrick*, 108 S.Ct. at 1665. "Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state action doctrine." *Id.*

We therefore find that the California judiciary does not actively supervise the peer-review process. Accordingly, the state action doctrine does not protect peer-review proceedings in California from application of the antitrust laws.

## 2. Reviewability

[4] Appellees raise several arguments in support of the contention that we should decline to review the case at this time. The argument that the case is not ripe is frivolous because Pinhas has already been removed from Midway and an "805 Report" has been filed against him.

Regardless of the outcome of the writ of mandamus action, Pinhas still has a viable antitrust claim. As is clear from the Supreme Court's decision in *Patrick*, that the peer-review proceedings were not yet complete when this suit was filed does not bar review of Pinhas's action. *See id.* at 1661 (stating that case was filed during course of peer-review proceedings).

[5] Appellees also appear to contend that Pinhas failed to exhaust his available administrative remedies. Initially, we are not convinced that the requirement of exhaustion of administrative remedies is applicable in this case because an administrative agency is not involved. The peer-review process is conducted by a private entity and is judicially reviewable in the California state courts. The reasons for giving deference to an agency, *see e.g., Morrison-Knudsen Co. v. CHG Int'l, Inc.*, 811 F.2d 1209, 1223 (9th Cir.1987), simply are not applicable here. In any event, where, as here, there is no statutory requirement of exhaustion of administrative remedies, application of the exhaustion doctrine lies within the discretion of the trial court. *See id.* The district court did not abuse its discretion by entertaining Pinhas's suit.

[6] Appellees next argue that the doctrine of primary jurisdiction precludes review of Pinhas's suit while the peer-review proceedings remain ongoing. The primary jurisdiction doctrine "is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are 'within the special competence of an administrative body.'" *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370 (9th Cir. 1985) (quoting *United States v. Western Pacific R.R.*, 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956)). Again, we doubt the application of this argument where no agency action is directly involved. Nevertheless,



the doctrine does not apply here because the proceedings at the state level, designed to determine whether Pinhas received a fair hearing, will not help clarify and narrow Pinhas's antitrust claims. See 6 J. Von Kalinowski, *Anti-trust Laws & Trade Regulation* § 44A.01[2][b], at 44A-14 (1989) ("The doctrine of primary jurisdiction will not be invoked if it is clear that the agency's decision will have no bearing on the antitrust issues.").

[7] Abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), is also inappropriate. *Burford* abstention is appropriate when a federal court is presented with "difficult questions of state law bearing on policy problems of substantial public import 'whose importance transcends the result in the case then at bar.'" *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1151 (9th Cir.1988) (quoting *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)). Application of the Sherman Act, in this case, does not involve difficult questions of state law.

Finally, appellees rely on *Mir v. Little Co.*, 844 F.2d 646 (9th Cir.1988), for the proposition that the court should abstain under principles of federalism and comity. In *Mir*, however, we concluded that a doctor's common-law claims against a hospital were precluded under California state law because the doctor had failed to succeed in his action against the hospital for a writ of mandate. *Id.* at 650-51. The holding in *Mir* is thus inapposite to Pinhas's claim under the Sherman Act.

### 3. Nexus with Interstate Commerce

[8] Appellees contend that Pinhas's amended complaint fails to establish jurisdiction under the Sherman Act because it does not sufficiently allege "a required

nexus with interstate commerce." Appellees' primary contention is that interstate commerce will not be affected by the removal of Pinhas from the hospital staff.<sup>6</sup>

In order to establish jurisdiction under the Sherman Act, a plaintiff must "identify a relevant aspect of interstate commerce and then show 'as a matter of practical economics' that the Hospital's activities have a 'not insubstantial effect on the interstate commerce involved.'" *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762, 764 (9th Cir.1988) (summarizing this circuit's interpretation of *McLain v. Real Estate Bd.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980); quoting *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1291 (9th Cir. 1981)) *cert. denied* — U.S. —, 109 S.Ct. 1123, 103 L.Ed.2d 1986 (1989).

Appellees do not contend that Pinhas has failed to identify any relevant aspect of interstate commerce. Instead, their argument is directed at the second consideration, the effect on the relevant interstate commerce. Under the second requirement, Pinhas must show that "as a matter of practical economics" the activities of the appellees — the peer review process in general — have a "not insubstantial effect on the interstate commerce involved." *McLain*, 444 U.S. at 246; 100 S.Ct. at 511. Pinhas need not, as appellees apparently believe, make the more particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from

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<sup>6</sup>They argue that any medical payments received by the hospital will not be materially affected by Pinhas's removal from the staff at Midway. Appellees contend that "[a]t most, the extent of interstate commerce affected by such a removal, would be the number of out-of-state patients currently served and/or the amount of out-of-state revenues currently received by appellee for services specifically related to eye care and ophthalmic surgery." Appellant's Brief at 25.

working. *Id.* at 242-43, 100 S.Ct. at 509. He need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce. Appellees' contention that Pinhas failed to allege a nexus with interstate commerce because the absence of Pinhas's services will not drastically affect the interstate commerce of Midway therefore misses the mark and must be rejected.

#### 4. Injury to Competition

[9] Appellees argue that Pinhas's complaint was properly dismissed because it fails to allege an adverse effect on competition; appellees contend that the entire thrust of Pinhas's allegation of antitrust damages in his complaint is that his own private medical practice was injured and that unfair procedures in the administrative hearings will restrict his ability to gain income from a hospital-based practice at Midway.

To maintain a successful antitrust action, Pinhas must show that the alleged conspiracy among the appellees did more than injure him; he must prove an injury to the competition in the relevant market. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 (9th Cir.1988). Although the emphasis in determining whether an injury has occurred is properly on the injury to competition and not to the competitor, *see Ralph C. Wilson Indus. v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1363 (9th Cir. 1986) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)), "injury to competitors may be probative of harm to competition," *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th

Cir.1988) *cert. granted*, — U.S. —, 109 S.Ct. 3154, 104 L.Ed.2d 1018 (1989); *accord USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 696 (9th Cir.1988) (quoting *Hasbrouck*), *cert. granted*, — U.S. —, 109 S.Ct. 2446, 104 L.Ed.2d 1001 (1989).

Pinhas alleges in his complaint that the conspiracy was intended to boycott his attempts at providing patients with lower prices as a result of his ability to perform operations at a rate quicker than that of his competitors. Assuming Pinhas's allegation that he provides his services at a rate cheaper than that of his competitors to be true, the preclusion of Pinhas from practicing could conceivably injure competition by allowing other similar doctors to charge higher prices for their services. Or Pinhas may show that his preclusion otherwise substantially reduced total competition in the market. We therefore conclude that Pinhas has adequately pleaded injury to competition.

#### 5. Conspiracy

Finally, appellees contend that the amended complaint fails adequately to plead an antitrust conspiracy. Section 1 of the Sherman Act is directed at prohibiting unreasonable restraint of trade effected by a "contract, combination . . . or conspiracy" among separate entities. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984). "The phrase 'contract, combination, or conspiracy' limits application of the Sherman Act to concerted conduct by more than one person or single entity." *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1449 (9th Cir.1988).

[10] Appellees contend that the dismissal of Weissburg & Aronson, and its principal, Mr. Kadzielski, should



be affirmed because they were only acting as agents of Summit Health. An attorney is not immune from antitrust liability if he becomes an active participant in formulating policy decisions with his client to restrain competition. See *Tillamook Cheese and Dairy Ass'n v. Tillamook County Creamery Ass'n*, 358 F.2d 115, 118 (9th Cir.1966); *Brown v. Donco Enter., Inc.*, 783 F.2d 644, 647 (6th Cir.1986) (per curiam). Pinhas sufficiently alleges in his complaint that Kadzielski, Weissburg & Aronson, and Posell exerted their influence over Summit Health and Midway so as to direct them to engage in the complained of acts for an anticompetitive purpose.

[11] Drs. Lurvey, Reader, Macy, Salz and Perlman are members of the medical staff at Midway. Any action taken by a medical staff satisfies the "contract, combination or conspiracy" requirement. *Weiss v. York Hosp.* 745 F.2d 786, 814-17 (1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985).

Appellees apparently argue that Summit Health, as a parent of Midway, cannot "conspire" with Midway, and that Midway cannot "conspire" with the medical staff. See *Oltz*, 861 F.2d at 1449-50 (recognizing that a hospital and member of its medical staff may under certain circumstances constitute separate entities for purposes of adequately pleading a section 1 conspiracy); *but see Weiss*, 745 F.2d at 814-815. Pinhas alleges, however, that both entities conspired with Kadzielski, Weissburg & Aronson, and Posell, all outside agents of both Midway and Summit Health. Accordingly, Midway and Summit Health are not properly dismissed.

Finally, Feldman and Farber, as employees of Midway and/or Summit Health, cannot "conspire" with their employer corporations. *Id.* at 1450 (quoting *Copperweld*, 467 U.S. at 769, 104 S.Ct. at 2740). Again, however,

Pinhas's complaint, read in the light most favorable to him, alleges that Feldman and Farber entered into an agreement with the other appellees. We therefore find the "conspiracy" requirement of section 1 of the Sherman Act satisfied as to each of the defendants. For the foregoing reasons, we reverse the dismissal of Pinhas's antitrust claim.

#### B. Procedural Due Process Claim

[12] Pinhas alleges that the peer-review proceedings before the JRC violated his right to due process under the fourteenth amendment. The district court dismissed Pinhas's due process claim concluding that it did not meet the "state action" requirement.

The central inquiry in determining whether a private party's actions constitute "state action" under the fourteenth amendment is whether the party's actions may be "fairly attributable to the State". *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). To this end, the Court has followed a two-part analysis: "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

There is little doubt that the first prong under *Lugar* has been satisfied. Midway is required under California state law to include in its bylaws a mechanism by which a physician may appeal a hospital's decision to remove him from its staff. See Cal.Admin.Code tit. 22, § 70703(b). Additionally, the SDHS, in reviewing hospitals during the licensing process, looks to determine whether a functional, operating peer-review process is in place. The peer-

review process is thus a rule of conduct imposed by the state of California within the meaning of *Lugar*.

Under the second prong in *Lugar*, Pinhas argues that the actions of those involved in the peer-review process should be construed as that of the state because of the statutorily created system of peer-review, which Pinhas argues, actively seeks to integrate private and public systems of review. State regulation of a private entity, however, is not enough to support a finding of state action. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974); *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982). Pinhas must show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351, 95 S.Ct. at 453; see also *Blum*, 457 U.S. at 1004, 102 S.Ct. at 2785. Additionally, a state may be held responsible for the action of a private party only when it "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.*

The challenged action here, the removal of Pinhas's staff privileges at Midway, cannot be attributed to the state of California. Only private actors were responsible for the decision to remove Pinhas. That the decision was made pursuant to a review process that has been approved by the state is of no consequence: the decision ultimately turned on the "judgments made by private parties according to professional standards that are not established by the State." *Blum*, 457 U.S. at 1008, 102 S.Ct. at 2788. Additionally, the fact that a hospital must forward to the BMQA an "805 report" whenever any

adverse action is taken against a doctor is irrelevant in determining whether the state took an active role in removing Pinhas's privileges. See *id.* at 1009-10, 102 S.Ct. at 2788 (penalties imposed for violating regulation requiring nursing home officials to conduct periodic review of type of care necessary for each resident adds nothing to claim of state action). In short, Pinhas has failed to demonstrate that the state exercised coercive power or encouraged his removal in any way.

Pinhas also attempts to characterize the appellees as state actors by arguing that the "integration of public and private systems of peer review" meets the "symbiotic relationship" test set forth in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Pinhas appears to argue that the state of California acts with those involved in the review proceedings as a "joint participant" in deciding whether a physician has been properly removed.

The relationship which exists between the state of California and those involved in the peer-review proceedings is far different than that which existed between the city of Wilmington and the lessee of the restaurant in the public parking garage in *Burton*. There is no financial relationship between the two, nor is any real property involved. This difference is sufficient to place this case out of the ambit of *Burton*. See *Jackson*, 419 U.S. at 357-58, 95 S.Ct. at 456-57 (limiting reach of *Burton*); *Blum*, 457 U.S. at 1010-11, 102 S.Ct. at 2789 (same).

Finally, we note that the Sixth and Seventh Circuits have also determined that a decision by a hospital to terminate or restrict the staff privileges of one of its physicians may not be attributed to the state for purpose of establishing state action under the fourteenth amendment. See *Ezpeleta v. Sisters of Mercy Health Corp.*, 800



F.2d 119, 122-23 (7th Cir.1986); *Crowder v. Conlan*, 740 F.2d 447, 451 (6th Cir. 1984). Because Pinhas's removal was instrumented solely by private parties, state action is absent and his due process claim was properly dismissed.

### C. Declaratory Judgment

[13] The district court dismissed Pinhas's claim for a declaratory judgment because it was not ripe and the appellees had no interest in the enforcement of either the state or federal regulation and therefore were not the proper parties to defend the statutes.

We agree with the district court that the appellees are not the appropriate parties to defend a constitutional challenge to the relevant state and federal statutes. See *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1361 (9th Cir.1977) (dismissing claim for declaratory judgment against counties because counties' interest in the ordinance challenged was purely ministerial),<sup>7</sup> *affirmed in part, reversed in part*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

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<sup>7</sup> In *Jacobson*, the plaintiffs requested a declaratory judgment to preclude the enforcement of a land use ordinance enacted by the Tahoe Regional Planning Authority (TRPA). The court dismissed the claim for declaratory judgment against several counties in the Lake Tahoe Basin:

[T]he action against the counties was properly dismissed because the alleged infringement of constitutional rights arises from the action of the TRPA. The Compact limits the involvement of the counties to a sharing of the enforcement power with the cities, the states and the TRPA. Their involvement is purely ministerial, and thus peripheral to the allegations underlying this suit.

*Jacobson*, 566 F.2d at 1361.

## IV

### CONCLUSION

We reverse the dismissal of the antitrust claim and affirm the dismissal of the section 1983 claim and request for declaratory judgment. Each party shall bear its own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED



UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SIMON J. PINHAS, M.D.,  
*Plaintiff,*

v.

SUMMIT HEALTH, LTD., a corporation; MIDWAY  
HOSPITAL MEDICAL CENTER, a California general  
hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL  
MEDICAL CENTER, an unincorporated association;  
MITCHELL FELDMAN; AUGUST READER; ARTHUR N.  
LURVEY, RICHARD E. POSELL; JONATHAN I. MACY;  
JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER;  
MARK KADZIELSKI; WEISSBURG and ARONSON, INC.;  
and STATE OF CALIFORNIA BOARD OF  
MEDICAL QUALITY ASSURANCE,  
*Defendants.*

Case No. 87 03292 FFF (GHKx)

**ORDER DISMISSING ACTION**

FILED: October 5, 1987  
ENTERED: October 9, 1987

On September 21, 1987 the Motions of defendants Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathan I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc. to dismiss plaintiff's Complaint and this action made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), together with defendants' Motions for Sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure came on for hearing before Ferdinand F. Fernandez, United States District Judge, Judge Presiding. The moving parties were repre-

sented by J. Mark Waxman, Esq. of Weissburg and Aronson, Inc. Plaintiff was represented by Lawrence Silver, Esq. and Alicia G. Rosenberg, Esq.

The Court, having considered all of the pleading, files, memoranda and documents on file herein, determined to grant the Motion for Dismissal filed by moving parties, and to deny the Motion for Sanctions pursuant to Rule 11.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint against Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathan I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc. shall be and is hereby dismissed without leave to amend.

Dated: October 2, 1987

FERDINAND F. FERNANDEZ  
United States District Judge

Presented by:

J. MARK WAXMAN, ESQ.  
WEISSBURG AND ARONSON, INC.  
*Attorneys for Summit Health, Ltd. et al.*

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CASE NO. C 699 088  
SUPERIOR COURT FOR THE STATE OF  
CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

SIMON J. PINHAS, M.D.,  
*Petitioner*

v.

MIDWAY HOSPITAL MEDICAL CENTER, a California corporation, AND THE MEDICAL STAFF OF MIDWAY HOSPITAL, an unincorporated association,  
*Respondents.*

**JUDGMENT DENYING PREEMPTORY  
WRIT OF MANDATE AND AWARDING COSTS**

This matter came on regularly for hearing before the Honorable Dzintra Janavs in Department 86 of this court on April 14, 1989. Lawrence Silver, Esq. appeared as attorney for Petitioner and Weissburg and Aronson, Inc., by Kenneth M. Stern, Esq. appeared as attorneys for Respondent. The Court having reviewed all pleadings, records, evidence and papers filed herein and having heard the oral argument of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

(1) Judgment herein is entered in favor of Respondent against the Petitioner denying the Petition for Writ of Mandate;

(2) The action is hereby dismissed with prejudice;

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(3) Respondent Midway Hospital Medical Center is awarded its costs in the amount of \$

Dated: May 17, 1989

DZINTRA JANAUS

Dzintra Janavs  
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF LOS ANGELES  
DEPT. 86

Date April 20, 1989. Honorable Dzintra Janavs, Judge,  
C. Hudson, Deputy Clerk.

C 699 088  
SIMON J. PINHAS, M.D.  
vs.  
MIDWAY HOSPITAL MEDICAL CENTER,  
a California corporation, etc.

RULING ON SUBMITTED MATTER

On April 14, 1989, at the hearing on petitioner's motion for a peremptory writ of mandate this Court admitted into evidence by reference:

1. Transcript of hearing Vols. I-IV (5/26 — 6/12/87)
2. Transcript of hearing Vols. I-IV (10/29/87 — 1/25/88)
3. Exhibits, Vol. I
4. Petitioner's Exhibit List and Exhibits attached thereto.
5. Declaration of Lawrence Silver dated 9/19/88 attached to Trial Brief dated 9/19/88. Objections are overruled as no objection is addressed to a specific statement. Objections that the "entire declaration is filled with "conclusions, opinions and hearsay" cannot be sustained.
6. Exhibits A, B, C attached to Request to Take Judicial Notice, etc. will be judicially noticed.

After arguments, the matter was taken under submission.

The Court now rules:

Substantial judgment test is applicable herein. *Anton*, 19 Cal.3d 802, has disposed of petitioner's equal protection argument. However, even if the independent judgment test applied, this Court's ruling would be the same.

The Motion for a Writ of Mandamus is denied.

I. The findings as to Charge 1c are supported by substantial evidence. See generally Vol. I, pp. 96-118, Vol. II, pp. 277, 297-308, 299-300, 491-492, Vol. V, pp. 768-769, 947-962. Specific charts are mentioned at pp. 99-116, 108-118, 297-300, 947 et seq.

II. *Due Process Issues.*

The Court has carefully reviewed all of the transcripts and documentary evidence, including portions not relevant to charges under 1c, to determine whether petitioner's contentions of unfairness of the hearing are substantiated by the record or whether or not the hearing was fair and comported with the requirements of due process. The Court concludes that the hearing was fair and did not violate Dr. Pinhas' due process rights.

With respect to the specific issues raised by the petitioner in this regard, the Court holds as follows:

1. Failure to produce Dr. Lurvey and Dr. Feldman:

There is no indication that these witnesses were percipient witnesses as to any of the events at issue. Petitioner's offer of proof shows why their non-appearance does not violate due process and is not prejudicial. The issue here is whether or not the charge on which petitioner was found to be guilty is supported by the evidence. These witnesses' motives for signing the charges are irrelevant.



## 2. Witness intimidation:

The record does not show that the nurse witnesses were threatened by Ms. Farber. Rather she provided them with the kind of advice that the hospital apparently provides to all prospective witnesses who might testify in a case. The record indicates that all four witnesses did proceed to testify on Pinhas' behalf. There are no declarations by any of them that they, in fact, testified untruthfully or that they would have offered different testimony except for the "threats."

## 3. The burden of proof:

Petitioner contends that he was denied due process because the burden of proof was imposed on him. *Anton* disposes of petitioner's contention, this Court agreeing with respondent's interpretation of the case. See also *Gill*.

## 4. Petitioner's contention of unfairness because two of his competitors sat on the judicial review committee:

Presence on the committee by these individuals was in accordance with respondent's bylaws. Under the case law dealing with administrative hearings, no case holds that due process is violated in the circumstances here. Furthermore, these "competitors" ruled in Pinhas' favor on six out of seven charges, though, based on the record, a different result would not be surprising if indeed the decision makers were acting with bias.

## 5. Ex parte contacts, quorum, right to counsel:

The record does not show improper *ex parte* contacts tainting the proceedings. Because of the pending federal lawsuit by Dr. Pinhas, it would have been impossible to avoid some *ex parte* contacts without the Hospital hiring additional counsel. Although it would've been preferable

to avoid all *ex parte* contacts, there is no indication that petitioner's case herein was prejudiced by such contacts as did occur.

Less than a full board hearing of the JRC appeal is permissible under the bylaws, which allow a quorum of five members out of the nine. Nor was Pinhas improperly deprived of counsel. See *Anton, Gill*.

## 6. Hearing Officer Posell

With respect to the bias of Hearing Officer Posell, the Court's review of the transcript does not indicate that Mr. Posell was biased towards the defendants. In fact, he admonished the petitioner and petitioner's witnesses as much as the respondents'. Furthermore, Mr. Posell did not take part in the decision making and there is no indication that anything he did resulted in prejudice to the petitioner.

Copies of this Minute Order are mailed this date to:

Lawrence Silver, Esq.  
A Law Corporation  
9100 Wilshire Blvd., Ste. 360  
Beverly Hills, CA 90212

Robert J. Gerst, Esq.  
Kenneth M. Stern, Esq.  
Mark A. Kadzielski, Esq.  
WEISSBURG & ARONSON, INC.  
32nd Fl., Two Century Plaza  
2049 Century Park East  
Los Angeles, CA 90067

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SIMON J. PINHAS, M.D.,  
*Plaintiff,*

v.

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL  
MEDICAL CENTER, a California general hospital; THE  
MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER,  
an unincorporated association; MITCHELL FELDMAN; AUGUST  
READER; ARTHUR N. LURVEY; RICHARD E. POSELL;  
JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN;  
PEGGY FARBER; MARK KADZIELSKI;  
WEISSBURG & ARONSON; and STATE OF CALIFORNIA BOARD  
OF MEDICAL QUALITY ASSURANCE,  
*Defendants.*

Case No. 87-03292 FFF (GHKx)

FIRST AMENDED COMPLAINT FOR VIOLATION OF  
CONSTITUTIONAL RIGHTS AND CIVIL RIGHTS  
(42 U.S.C. § 1983 and § 1985(3)); DECLARATORY  
JUDGMENT AND TREBLE DAMAGES FOR  
VIOLATION OF SECTION 1 OF THE SHERMAN  
ANTI-TRUST ACT AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

STATEMENT AS TO JURISDICTION

1. This civil action arises under the Constitution of the  
United States and 42 U.S.C. § 1983, § 1985, and § 1988; 28  
U.S.C. § 2201 and § 2202, and 15 U.S.C. § 1.

2. This court has jurisdiction of the action under 28  
U.S.C. § 1331, § 1337 and § 1343, and 15 U.S.C. § 4 and  
§ 15.

3. The matter in controversy exceeds Ten Thousand  
Dollars (\$10,000), exclusive of interest and costs.

VENUE

4. Venue is proper pursuant to 28 U.S.C. §§ 1391 and  
1392.

PARTIES

5. Plaintiff, Simon J. Pinhas, M.D., ("Dr. Pinhas") is  
a physician and surgeon duly licensed by the defendant,  
State of California, Board of Medical Quality Assurance  
and has limited his practice to that of eye physician and  
ophthalmological surgeon. Plaintiff presently, and at all  
times stated herein, was a Board certified surgeon, having  
been certified in 1982. Plaintiff has been engaged in the  
practice of medicine and surgery since 1977 and as such  
has engaged in interstate commerce. Until the grievances  
hereinafter complained of, plaintiff was a member, in good  
standing, of the defendant Medical Staff of Midway Hos-  
pital. Plaintiff is a citizen of the United States and a  
resident of the State of California and this judicial  
district.

6. Defendant Summit Health Ltd. ("Summit Health")  
is a corporation authorized to do business pursuant to the  
laws of the State of California and is the parent of  
Midway Hospital and Medical Center. Summit Health is  
engaged in interstate commerce and owns and operates  
approximately 19 hospitals and 49 nursing home facilities  
in California, Arizona, Colorado, Oregon, Iowa, Washing-  
ton, Texas and Saudi Arabia.

7. Defendant Midway Hospital Medical Center ("Mid-  
way Hospital") is engaged in interstate commerce and is  
a general hospital organized and existing pursuant to the

laws of the State of California and conducts its business by providing medical facilities and medical care in Los Angeles, California.

8. Defendant Medical Staff of defendant Midway Hospital ("Medical Staff") is an unincorporated association of physicians engaged in interstate commerce practicing medicine at Midway Hospital with its principal place of activity located at Los Angeles, California. Defendant Medical Staff, in a conspiracy with other defendants, has wrongfully summarily suspended plaintiff and has commenced and prosecuted an unjustified, illegal and unconstitutional peer review proceeding ("Peer Review Proceeding") against plaintiff.

9. Mitchell Feldman ("Mr. Feldman") at all times mentioned herein was the regional vice-president of defendant Summit Health, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

10. Defendant August Reader, M.D. ("Dr. Reader") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is competition with plaintiff Dr. Pinhas. Dr. Reader is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

11. Defendant Arthur Lurvey, M.D. ("Dr. Lurvey") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and at all times mentioned herein was the Chief of Staff of Midway Hospital. Dr Lurvey is engaged in interstate commerce, is a citizen of the United States, resident of the State of California and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

12. Defendant Richard E. Posell ("Mr. Posell") is, and at all times herein mentioned was engaged in interstate commerce and was, an attorney at law, duly admitted and practicing law in the State of California and is a citizen of the United States, resident of the State of California and a resident of this judicial district, and has caused, directly or indirectly, the prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

13. Defendant Jonathan I. Macy, M.D. ("Dr. Macy") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr Macy is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.



14. Defendant James J. Salz, M.D. ("Dr. Salz") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr. Salz is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

15. Defendant Gilbert Perlman, M.D. ("Dr. Perlman") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr. Perlman is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

16. Defendant Peggy Farber ("Ms. Farber") is employed by defendants Summit Heath and Midway Hospital in their Risk Management Section. At the direction of her employers and others, she was charged with (a) securing the information which was placed in the false charges brought against Dr. Pinhas and (b) interfering with Dr. Pinhas' defense against those charges at the Peer Review Proceedings. Ms. Farber is a

citizen of the State of California, and a resident of this judicial district.

17. Defendant Mark A. Kadzielski ("Mr. Kadzielski") is a principal of defendant Weissburg & Aronson Inc., and at all times herein mentioned was engaged in interstate commerce and was, an attorney at law, duly admitted and practicing law in the State of California. Mr. Kadzielski is a citizen of the State of California, and a resident of this judicial district, and has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

18. Defendant Weissburg & Aronson Inc. ("W&A") is engaged in interstate commerce and is a professional corporation engaged in the practice of law in the State of California and this judicial district, and has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

19. Defendant State of California, Board of Medical Quality Assurance ("BMQA") is an agency of the State of California created by and existing pursuant to Business and Professions Code, § 2000 et seq. Defendant BMQA is charged with the responsibility of enforcing, among others, Sections 805, 805.1 and 805.5 of the California Business and Profession Code as well as Section 423 et. seq. of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11133, et. seq.

20. Relief is sought against each and all defendants, as well as their agents, assistants, successors, employees, attorneys, representatives and all persons acting in concert or in cooperation with them or at their direction.

## FACTUAL ALLEGATIONS

21. From October, 1981 through the present, plaintiff Dr. Pinhas, a diplomat of the American Board of Ophthalmology, has been a member of the defendant Medical Staff. As such, he has had the right to cause the admission of his patients to defendant Midway Hospital and to use defendant Midway Hospital's facilities for the care and treatment of his patients, including, but not limited to, the facilities to perform eye surgery.

22. By reason of his training, experience and skill, Dr. Pinhas holds a national and international reputation as a specialist in corneal eye problems. He performs general eye surgery and specifically cornea transplants, cataract removal, and interocular lens replacements. Because of his training, experience and skill, Dr. Pinhas is able to perform these surgeries with a high level of success and with few, if any, complications. One of the reasons for his success is the rapidity with which he, as distinguished from his competitors, can perform such surgeries. The speed with which such surgery can be completed benefits the patient because the exposure of cut eye tissue is drastically reduced. Some of Dr. Pinhas' competitors regularly require, on the average, six times the length of surgical time to complete the same procedures as Dr. Pinhas. Because of his reputation, skill and successes Dr. Pinhas has performed more surgeries than any other ophthalmic surgeon at Midway Hospital during the relevant time period.

23. Prior to February, 1986, the common practice in Los Angeles County was to have most eye surgeries, especially cataract extractions, performed by a primary surgeon and a second, assistant surgeon. This practice required by the defendant Medical Staff, the ("assistant

surgeon requirement"), significantly increased the cost of such eye surgeries.

24. In February 1986, the administrators of Medicare, the federal health insurance program for the elderly, determined that assistant surgeons were not necessary in connection with the performance of such eye surgeries and refused, henceforth, to provide reimbursement for the charges of any such assistant.

25. Certain ophthalmic surgeons of staff at defendant Midway Hospital, including plaintiff Dr. Pinhas, requested that the defendant Medical Staff modify its assistant surgeon requirement. Nearly all hospitals in Southern California, except defendant Midway Hospital and Cedars-Sinai (whose Medical Staff overlaps with that of defendant Midway Hospital), abolished the assistant surgeon requirement at or about the time that Medicare made its change. The request to eliminate the assistant surgeon requirement at Midway Hospital was denied and remains in effect at the time of the filing of this First Amended Complaint.

26. The consequence of the failure to make the change was that surgeons, such as the plaintiff, would have to compensate their competitors to be their assistants during surgery since Medicare would no longer compensate such assistants. Plaintiff Dr. Pinhas advised the administration of Midway Hospital that the additional costs to him of the Medical Staff's refusal to eliminate the assistant surgeon requirement would be about \$60,000 per year. Dr. Pinhas, expressing a desire to keep the bulk of his practice at defendant Midway Hospital, nonetheless stated that he would move his practice if the assistant surgeon requirement was not abolished.



27. On or about January 26, 1987 defendants Summit Health and Midway Hospital, seeking to resolve the difficulty created by defendant Medical Staff's refusal to abolish the assistant surgeon requirement and Medicare's refusal to reimburse for assistant surgeons. Defendant Summit Health and Midway Hospital offered a "sham" contract to Dr. Pinhas, a true and correct copy of this "sham" contract is attached hereto and made a part hereof as Exhibit "A". The scheme provided by this "sham" contract was to "hire" Dr. Pinhas for \$36,000 per year (later raised orally to \$60,000 per year) to perform certain services, except, Dr. Pinhas would never be called upon to do such work. The "sham" contract was a vehicle by which defendants Summit Health and Midway Hospital would pay Dr. Pinhas for continuing to bring patients to Midway Hospital. When the "sham" contract was explained to Dr. Pinhas, he was told that many of the members of the defendant Medical Staff had similar contracts, and that the Chief of the defendant Medical Staff, defendant Dr. Lurvey, was aware of this proposed contract and the other "sham" contracts.

28. Dr. Pinhas refused to in anyway participate in such a scheme, refused to sign the contract, and refused to return the contract, even after defendant Dr. Lurvey, acting on behalf of himself, defendant Summit Health, defendant Mr. Feldman, defendant Midway Hospital and defendant Medical Staff threatened that plaintiff's failure to do so would cause a review of his charts and possible Peer Review Proceedings. Nevertheless, defendants Summit Health and Midway Hospital made one monthly payment of \$5000 to Dr. Pinhas. This payment was "hidden" in a reimbursement check to Dr. Pinhas and was promptly recorded by Dr. Pinhas as an overpayment and a credit against the amount of defendants Midway Hospital and Summit Health otherwise owed Dr. Pinhas.

29. By letter dated April 13, 1987 ("April 13, 1987 letter"), and without prior notice or an opportunity for a hearing, Dr. Pinhas was advised by defendants Summit Health and Midway Hospital, through defendants Dr. Lurvey and Mr. Feldman, that he was summarily suspended as of that immediate date. As such, Dr. Pinhas was deprived of all medical staff privileges, including the right to admit his patients and to perform surgical procedures. The April 13, 1987 letter stated that such action was the result of a "medical staff review of Dr. Pinhas' medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." (A true and correct copy of the April 13, 1987 letter is attached hereto as Exhibit "B" and made a part hereof.)

30. By the same April 13, 1987 letter, Dr. Pinhas was advised that the Midway Hospital Medical Executive Committee ("Midway Executive Committee") would convene to review and consider the action within 10 days.

31. On April 20, 1987 the Midway Executive Committee met. After an initial meeting from which Dr. Pinhas was excluded, the Executive Committee invited him into the meeting room and requested that Dr. Pinhas make a statement. Lacking sufficient notice, unprepared, confused and without benefit of legal or fellow staff advice, he asked what the charges were, and was told that the letter of April 13, 1987 was self-explanatory. Thereafter, Dr. Pinhas attempted to reply briefly.

32. By letter dated April 20, 1987, the same date of that meeting, defendants Midway Hospital and Summit Health notified Dr. Pinhas that the Midway Executive Committee had upheld the summary suspension with the



recommendation to terminate his staff privileges at Midway Hospital. He was also informed that the Midway Hospital Board of Directors had concurred with the Midway Executive Committee's recommendation. (A true and correct copy of the April 20, 1987 letter is attached hereto as Exhibit "C" and made a part hereof.)

33. In accordance with the Midway Hospital Medical Staff Bylaws ("Bylaws", a true and correct copy of the relevant portions of which are attached hereto as Exhibit "D" and made a part hereof), Dr. Pinhas requested a hearing by the Midway Hospital Judicial Review Committee ("Judicial Review Committee") by letter dated April 30, 1987. (A true and correct copy of the April 30, 1987 letter is attached hereto as Exhibit "E" and made a part hereof.)

34. In his April 30, 1987 letter, Dr. Pinhas made certain procedural and discovery requests, including the right to be represented by retained counsel, the right to full disclosure with sufficient particularity of all charges against him, the right to an impartial hearing officer, and the right to an unbiased, unprejudiced hearing panel.

35. On May 7, 1987 Dr. Pinhas received Midway Hospital's Notice of Hearing ("May 7, 1987 Notice") from defendants Midway Hospital and Summit Health, through defendant Mr. Feldman, scheduling the Judicial Review Committee's proceedings to commence on May 12, 1987. (A true and correct copy of the May 7, 1987 Notice is attached hereto as Exhibit "F" and made a part hereof.)

36. The May 7, 1987 Notice, according to the Bylaws, is also meant to serve the function of notifying a Respondent before the Judicial Review Committee of the charges that are being made against him. Those charges as con-

tained in the May 7, 1987 Notice were rendered in broad, general terms. The Notice listed "specific charts" that the Hospital contended would support those charges. But the charts identified were not made available to Respondent as of the date of May 7, 1987 Notice. Approximately 128 charts were identified, though some appeared to be duplicates.

37. The May 7, 1987 Notice announced the appointment, by defendant Dr. Lurvey, of the members of the Judicial Review Committee and the appointment of the Hearing Officer, defendant Mr. Posell. All of the physicians who are included as members of the Judicial Review Committee are dependent upon the defendants Midway Hospital and Summit Health for their economic livelihood and professional activities. The members of the Judicial Review Committee, members of the defendant Medical Staff, together with defendants Summit Health, Midway Hospital, Dr. Lurvey, Mr. Feldman and Mr. Posell are represented by the same counsel, defendant W&A. W&A has represented the other defendants in connection with the preparation of the false and unjustified charges brought against plaintiff Dr. Pinhas.

38. The Judicial Review Committee, over the objection of Dr. Pinhas, included physicians who were and are in direct economic and professional competition with plaintiff Dr. Pinhas: John Hofbauer, M.D. and Stephen Seiff, M.D.

39. The May 7, 1987 Notice, in a summary fashion dismissed some of Dr. Pinhas' procedural and discovery requests, and stated that the Judicial Review Committee had unanimously voted not to permit Dr. Pinhas to be represented by an attorney at law at the hearing.

40. On May 9, 1987, Dr. Pinhas filed his Objections to the Notice of Hearing ("Objections"). (A true and correct copy of Dr. Pinhas' Objections is attached hereto as Exhibit "G" and made a part hereof.)

41. In his Objections, Dr. Pinhas contended that the May 7, 1987 Notice did not provide a reasonable quantum of time in which he could prepare, present, and have decided the preliminary Motions that he believed had to be resolved — with respect to procedure and substance — prior to the hearing of his matter. Moreover, Dr. Pinhas argued that without more specific information, and without possession and sufficient review and analysis of documentary evidence, the Judicial Review Committee hearing, as established and scheduled, contravened his rights under the United States and California Constitutions, the laws of the State of California, and the contractual obligations imposed upon defendant Midway Hospital and the defendant Medical Staff to fair notice and a rational and meaningful opportunity to be heard.

42. In his Objections, Dr. Pinhas requested that the Judicial Review Committee sustain those objections and dismiss the Notice of Hearing as totally defective.

43. On May 12, 1987, the administration of defendants Midway Hospital and Summit Health did not act upon the objection, but treated it as a request for a continuance and granted Dr. Pinhas a two week continuance, rescheduling the Judicial Review Committee hearing for May 26 and 27, 1987.

44. Because the May 7, 1987 Notice of Hearing named defendant Mr. Posell as the Hearing Officer, on May 8, 1987, Dr. Pinhas, through his counsel Lawrence Silver, sent Mr. Posell a letter requesting that he respond to certain questions in order that Dr. Pinhas could deter-

mine whether to file a challenge to Mr. Posell sitting as the Hearing Officer. (A true and correct copy of the May 8, 1987 letter is attached hereto as Exhibit "H" and made a part hereof.)

45. By letter ("Posell letter") dated May 11, 1987, Mr. Posell refused to respond to Dr. Pinhas' request. (A true and correct copy of the Posell letter is attached hereto as Exhibit "I" and made a part hereof.)

46. On May 14, 1987, Dr. Pinhas, through his counsel, filed 15 Motions with respect to procedural and discovery issues, including Motions regarding his request for representation by counsel and his request that Mr. Posell respond to certain voir dire questions in order to ascertain any bias, prejudice, or interest on Mr. Posell's part. (True and correct copies of these Motions are attached hereto as Exhibit "J" and made a part hereof.)

47. On information, knowledge and belief, plaintiff alleges that defendant Mr. Posell is biased and prejudiced against he and his counsel, Lawrence Silver, and that Mr. Posell and members of the law firm of which he is a partner, Shapiro, Posell & Close, serve as hearing officers at the request of defendant W&A in cases where W&A represents the hospital. There is a unity of interest between defendants W&A and Mr. Posell. Mr. Posell and his law firm are retained and continue to be retained as counsel to the Hospital because Mr. Posell ensures that Judicial Review Committees achieve the results that W&A and the clients of W&A desire. Mr. Posell and Shapiro, Posell & Close have an economic interest in the outcome of the Peer Review Proceeding and had such an economic interest at the outset because his continued employment by defendant Summit Health, defendant Midway Hospital, defendant W&A and defendant Kadzielski depends upon his continued rulings in favor of



the defendant Midway Hospital's position and against physicians who are in the same position as Dr. Pinhas.

48. On May 18, 1987, Mr. Posell wrote to Dr. Pinhas' counsel and reiterated that the May 7, 1987 Notice advised Dr. Pinhas that the Judicial Review Committee had unanimously voted not to permit either Dr. Pinhas or the Medical Staff to be represented by an attorney at law at the hearing. Mr. Posell further stated that neither the Hearing Officer nor the Judicial Review Committee may consider Motions or requests made "in any phase of the hearing or appeal procedure by an attorney at law unless the Hearing Committee, in its discretion, permits both sides to be represented by legal counsel." Mr. Posell cited Bylaw Article VIII, Section 2(b), stating further that Dr. Pinhas' counsel's continued participation was a violation of that Bylaw. (A true and correct copy of Mr. Posell's May 18, 1987 letter is attached hereto as Exhibit "K" and made a part hereof.)

49. On May 19, 1987, Dr. Pinhas' counsel asked defendant Mr. Posell to recuse himself because of bias and prejudice and to answer three questions related to his ex parte communications with counsel for the defendant Midway Hospital, and for clarification of his ruling. (A true and correct copy of the letter to Mr. Posell dated May 19, 1987 is attached hereto as Exhibit "L" and made a part hereof.) Mr. Posell has not responded to that letter.

50. On May 19, 1987, Dr. Pinhas, appearing in propria persona, refiled the same 15 Motions respecting procedural and discovery matters, specifically including: the request to be represented by counsel; the request that the Hearing Officer respond to the voir dire questions submitted to him; the request for the full disclosure with particularity of the charges against him; and the request that Dr.

Pinhas' motions be heard and decided at a reasonable time prior to the commencement of the hearing.

51. On May 21, 1987, defendant Mr. Posell denied nearly all of the Motions filed by Dr. Pinhas. (A true and correct copy of the letter from Mr. Posell dated May 21, 1987 is attached hereto as Exhibit "M" and made a part hereof.)

52. The alleged peer review hearings concerning Dr. Pinhas commenced on May 26 and proceeded for a total of six hearing sessions which were concluded on June 12, 1987.

53. During the course of the hearings, defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Posell, Mr. Kadzielski, W&A, Dr. Perlman, Mr. Feldman, Dr. Lurvey and Ms. Farber, engaged in conduct to deprive plaintiff Dr. Pinhas of a fair hearing.

54. On information, knowledge and belief, plaintiff alleges that defendants Mr. Kadzielski and W&A, directly and indirectly, had improper ex parte communications with defendant Mr. Posell.

55. On information, knowledge and belief, plaintiff alleges that defendants Mr. Kadzielski and W&A, directly and indirectly, had improper ex parte communications with members of the Judicial Review Committee.

56. On information, knowledge and belief, plaintiff alleges that defendant Dr. Perlman had improper ex parte communications with members of the Judicial Review Committee.

57. On information, knowledge and belief, plaintiff alleges that defendants Dr. Lurvey, the Medical Staff, Summit Health, Midway Hospital had improper ex parte



communications with members of the Judicial Review Committee.

58. On information, knowledge and belief, plaintiff alleges that defendant Mr. Posell had improper ex parte communications with members of the Judicial Review Committee.

59. Defendants Summit Health, Midway Hospital, Medical Staff and others sought to, and did in fact, intimidate witnesses Dr. Pinhas sought to call as witnesses in his defense of the case, including the threat of initiating Peer Review Proceedings against physicians who might testify on behalf of Dr. Pinhas.

60. Defendants Summit Health, Midway Hospital, Medical Staff, Ms. Farber and others sought to, and did in fact, intimidate witnesses Dr. Pinhas sought to call as witnesses in his defense of the case.

61. On June 1, 1987, at approximately 6:30 p.m., defendant Ms. Farber of Midway Hospital's Risk Management Section approached a table in the cafeteria where Marina Nino, Barbara Aviles, Rose Pierce and Suprani Watana, all of whom were employed by defendants Summit Health and Midway Hospital, were sitting while they were waiting to be called into the hearing regarding Dr. Pinhas' privileges. Ms. Farber said the following:

a. "I want to prepare you for what you are getting yourselves into."

b. "You don't have to do this."

c. "You can leave if you want to. You will not be persecuted or harassed if you leave."

d. "You are on your own, the hospital will not pay for your time."

e. "It is going to be like a court in there. There is a court stenographer. Everything you say will be taken down and under oath."

f. "You will each be called, one by one, you will not be allowed to go in as a group."

g. "You will be questioned in there by doctors, you will be cross-examined."

62. Shortly thereafter, Kay Deol, an administrator of defendant Midway Hospital and an employee of defendants Summit Health, Midway Hospital and Mr. Feldman, came over to the table and she and defendant Ms. Farber stayed around and hovered around the cafeteria for the rest of the evening. (True and correct copies of the declarations dated June 9, 1987 of Marina Nino and Barbara Aviles are attached hereto as Exhibit "N" and made a part hereof.)

63. Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Kadzielski, W&A, Mr. Posell, Mr. Feldman, and Dr. Lurvey, precluded plaintiff Dr. Pinhas from examining two important witnesses, Mr. Feldman, the person who signed the charges against Dr. Pinhas and Dr. Lurvey, Chief of Staff who allegedly authorized the charges against Dr. Pinhas. Said defendants refused to produce Mr. Feldman and Dr. Lurvey as witnesses for cross-examination even though,

a. Mr. Feldman signed the charges,

b. Dr. Lurvey was listed in Exhibit "F", the charges, as a witness who would appear at the hearing, and

c. Dr. Pinhas and his representative repeatedly requested that they appear at the hearing and testify truthfully. (A true and correct copy of Dr. Pinhas'

request to Dr. Lurvey and Mr. Feldman to appear are attached hereto as Exhibit "O" and made a part hereof.)

64. It is custom and practice in California that during the peer review proceeding, even if the Judicial Review Committee does not permit counsel to be present at the hearing, counsel is permitted to be on the grounds of the hospital to confer with his client during appropriate breaks in the proceeding.

65. Defendant Mr. Posell issued an order ordering counsel for Dr. Pinhas, who had been listed as a witness, excluded from the Hospital grounds during any portion of the hearing, while permitting counsel for the Hospital, Mr. Kadzielski and/or associates of W&A, not only to utilize hospital facilities, but also to communicate with the prosecutor, defendant Dr. Perlman.

66. Defendant Mr. Posell acted not only as Hearing Officer but also as counsel for defendant Midway Hospital and the Medical Staff, and ruled and continued to rule, without legal or factual justification, adversely to Dr. Pinhas.

67. Defendant Mr. Posell, acting as counsel for the Medical Staff, refused to allow Dr. Pinhas to have counsel.

68. Defendant Mr. Posell made rulings during the course of the entire proceeding to frustrate and interfere with plaintiff Dr. Pinhas' ability to defend against the charges brought against him.

69. Defendant Mr. Posell ruled that Dr. Pinhas' counsel's correspondence would not be answered, and yet complied with all requests of defendants Mr. Kadzielski and W&A.

70. Defendant Mr. Posell intentionally ordered witnesses not to testify to the fact that defendant Dr. Macy and defendant Dr. Salz, who testified adversely to Dr. Pinhas at the hearing, also engaged in the same similar conduct with which Dr. Pinhas was charged. Mr. Posell precluded them from being identified by witnesses who were prepared to identify Dr. Macy and Dr. Salz to establish what the "standard in the community" was. Defendant Mr. Posell declined to permit Dr. Pinhas and his physician representative to have breaks and time to confer. In addition, Mr. Posell issued time requirements which were inherently unfair, and substantially prejudiced Dr. Pinhas. Mr. Posell, on the other hand, always considered and granted whatever requests were made by the prosecutor defendant Dr. Perlman.

71. Defendant Mr. Posell precluded testimony and evidence from being presented by Dr. Pinhas, and made hostile verbal comments to Dr. Pinhas, his physician representative and witnesses who appeared on behalf of Dr. Pinhas on and off the record made before the Judicial Review Committees.

72. Defendant Mr. Kadzielski and W&A retained, as they have done in the past, the services of Lacey Shorthand Reporting Service ("Lacey Reporters"), over whom they seek to exercise and do exercise control by reason of the substantial business they place with Lacey Reporters. Dr. Pinhas needed a copy of the transcript in order to adequately examine witnesses and prepare cross-examination. Plaintiff Dr. Pinhas, through counsel, ordered a copy of the transcript from Lacey Reporters on an expedited basis. Notwithstanding the order, defendant Mr. Kadzielski and W&A ordered Lacey Reporters not to produce the transcript. On the same day as defendant Mr. Kadzielski and W&A issued their instructions to Lacey Reporters,



counsel for Dr. Pinhas inquired how the preparation of the transcript was coming and was advised that Lacey Reporters could not produce a transcript in any timely fashion by which Dr. Pinhas could be able to use it for successive hearings. Upon information, knowledge and belief, plaintiff alleges that Lacey Reporters did so at the request of defendants Mr. Kadzielski and W&A. A day or so later Lacey Reporters agreed to produce the transcript, but not before the date that its utility for cross-examination would have passed and at a page rate of \$12.00 per page.

73. Defendant Mr. Posell, after he heard from other defendants that plaintiff Dr. Pinhas, through counsel, was trying to secure a transcript, and while the hearing was pending, called Dr. Pinhas on the telephone. During that telephone conversation Mr. Posell called Dr. Pinhas a liar and threatened him by saying that Dr. Pinhas' attempts to get a copy of the transcript would cause him problems in the future.

74. On June 29, 1987 Dr. Pinhas received in the mail a document entitled "Report and Decision of the Judicial Review Committee ("Report and Decision") (a copy of the Report and Decision is attached hereto as Exhibit "P").

75. Upon information, knowledge and belief, plaintiff alleges that defendant Mr. Posell drafted the purported Report and Decision in an effort to protect defendants Summit Health, Midway Hospital, the Medical Staff, Dr. Lurvey, Mr. Feldman and himself from liability, and that such report was inconsistent with the findings and determinations of the Judicial Review Committee.

76. Although the alleged Report and Decision purports to bear the signature of the Chairman of the Judi-

cial Review Committee, Ellis Berkowitz, M.D.; it does not. Plaintiff on information knowledge and belief alleges that this alleged Report and Decision is not reflective of the determination of that tribunal. Plaintiff on information knowledge and belief alleges that this alleged Report and Decision was signed by an agent of defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman and Dr. Lurvey, without the authorization of each member of the Judicial Review Committee.

77. On July 6, 1987 the defendant Medical Staff appealed the decision of the Judicial Review Committee to the Governing Board of defendant Midway Hospital (a copy of the appeal of Defendant Medical Staff is attached hereto and made a part hereof as Exhibit "Q").

78. On July 7, 1987 Plaintiff Dr. Pinhas appealed the purported decision of the Judicial Review Committee to the Governing Board of the Defendant Midway Hospital (a copy of the appeal of plaintiff Dr. Pinhas is attached hereto as Exhibit "R").

### FIRST CLAIM FOR RELIEF

(For Declaratory Relief Against Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Lurvey and BMQA Because They are Violating the Constitution of the United States by Enforcing and Participating in the Enforcement of Section 805 and 805.5 of the California Business and Professions Code and Section 423, et seq of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11133)

79. Plaintiff incorporates Paragraphs 1 through 78, inclusive, above by reference as though set forth in full herein.



80. Defendants, and each of them, are estopped from denying, that the actions which the defendants have taken, and the actions which are threatened by the defendants, have been done and are being done pursuant to and under authority of the laws of the State of California and the laws of the United States.

81. Defendants, and each of them, are estopped from denying that they have acted, claim to act, and threaten to continue to act, pursuant to, under the authority of, and within the protection of:

a. Section 70703, et seq., of the California Administrative Code;

b. Section 805 of the California Business and Professions Code;

c. Section 805.5 of the California Business and Professions Code;

d. Section 805.1 of the California Business and Professions Code

e. Section 1094.5 of the California Code of Civil Procedure and the case law decided thereunder;

f. Sections 1156 and 1157 of the California Evidence Code;

g. Section 43.7 of the California Civil Code;

h. Other provisions of the laws of the State of California and the case law decided thereunder; and

i. Sections 423 et seq. of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11133, et. seq.

82. To maintain licenses, health care facilities regularly must review privilege termination and restriction procedures to assure their conformity to applicable law.

The California Administrative Code § 70703(a) requires that the Hospital "shall have an organized medical staff responsible to the governing body for the adequacy and quality of the medical care rendered to patients in the hospital." According to Title 22, California Administrative Code, § 70701(a)(1)(F), a Hospital must have a governing body which must adopt written bylaws, in accordance with legal requirements and its community, which shall include "self-government by the medical staff with respect to the professional work performed in the hospital . . ." The governing body shall "assure that the medical staff bylaws, rules and regulations are subject to governing body approval . . . , and these bylaws shall include an effective formal means for the medical staff, as a liaison, to participate in the development of all hospital policy." *Id.* at (8), (9).

83. When a health care facility terminates or restricts the privileges of a physician, it must promptly report to the defendant BMQA all facts and circumstances that caused the termination or restraint pursuant to Section 805 of the California Business and Professions Code, which reads as follows:

*"California Business and Professions Code §805*

The chief executive officer and the chief of the medical staff, where one exists, of any health facility licensed pursuant to Division 2 (commencing with Section 1200), or any medical, psychological, dental or podiatric professional society, or medical specialty society described in Section 43.7 of the Civil Code, or any health care service plan or medical care foundation shall report to the agency which issued the license, certificate or similar authority when any licensed physician and surgeon, psychologist, podiatrist, or dentist is denied staff privileges, removed

from the medical staff of the institution or if his or her staff or membership privileges are restricted for a cumulative total of 45 days in any calendar year for any medical disciplinary cause or reason. The reports shall be made within 20 working days following such removal or restriction, shall be certified as true and correct by the chief executive officer and the chief of the medical staff, where one exists, and shall contain a statement detailing the nature of the action, its date and all of the reasons for, and circumstances surrounding, the action. If the removal or restrictions is by resignation or other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state.

The reporting required herein shall not act as a waiver of confidentiality of medical records and committee reports. The information reported or disclosed shall be kept confidential except as provided in subdivision (c) of Section 800, provided that a copy of the report containing the information required by this section may be disclosed as required by Section 805.5 with respect to reports received on or after January 1, 1976. The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, and the Board of Dental Examiners shall disclose such reports as required by Section 805.5. A file containing reports received pursuant to this section shall be maintained by the agency receiving the reports for a minimum of five years after receipt.

No person shall incur any civil or criminal liability as the result of making any report required by this section.

Failure to make a report pursuant to this section shall be a misdemeanor punishable by a fine of not

less than two hundred dollars (\$200) nor more than one thousand two hundred dollars (\$1,200)."

84. Pursuant to Section 805.5 of the California Business and Professions Code, hospitals are required to request from BMQA information regarding any adverse determination made pursuant to the peer review process contained in BMQA's records. The pertinent parts of Section 805.5 of the California Business and Professions Codes read as follows:

*"California Business and Professions Code § 805.5*

(a) Prior to granting or renewing staff privileges for any physician and surgeon, clinical psychologist, podiatrist, or dentist, any health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, or any health care service plan or medical care foundation, or the medical staff of any such institution, shall request a report from The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, or the Board of Dental Examiners to determine if any report has been made pursuant to Section 805 indicating that the applying physician and surgeon, clinical psychologist, podiatrist, or dentist has been denied staff privileges, been removed from a medical staff, or had his staff privileges restricted as provided in Section 805. The request shall include the name and California license number of the physician and surgeon, clinical psychologist, podiatrist, or dentist. Furnishing of a copy of the 805 report shall not cause the 805 report to be a public record.

(b) Upon a request made by an institution described in subdivision (a) or its medical staff, which is received on or after January 1, 1980, the board



shall furnish a copy of any report made pursuant to Section 805. However, the board shall not send a copy of a report where the denial, removal, or restriction was imposed solely because of the failure to complete medical records.

In the event that the board fails to advise such institution within 30 working days following its request for a report required by this section, the institution may grant or renew staff privileges for the physician and surgeon, clinical psychologist, podiatrist, or dentist.

(c) Any institution described in subdivision (a) or its medical staff which violates the provisions of subdivision (a) is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars (\$200) nor more than one thousand two hundred dollars (\$1,200)."

85. California Business and Professions Code § 850.1 provides that the state licensing agency, defendant BMQA, is entitled to inspect and copy statements of charges, documents, medical charts or exhibits in evidence; and any opinion findings or conclusions relating to any disciplinary proceeding resulting in an action subject to § 805 of the Business and Professions Code reporting provisions.

86. A hospital's decision terminating and restricting privileges are judicially reviewable pursuant to Section 1094.5 of the California Code of Civil Procedure. (A copy of the text of Section 1094.5 is attached hereto as Addendum "A".)

87. Peer review proceedings are confidential pursuant to California Evidence Code Sections 1156 and 1157. (A

copy of the text of Sections 1156 and 1157 are attached hereto as Addendum "B".)

88. California provides immunity to participants in the peer review process pursuant to Section 43.7 of the California Civil Code. (A copy of the text of Section 43.7 is attached hereto as Addendum "C".)

89. Defendants are estopped from denying that they have been, are presently, and will be acting under color of authority of law and the protection afforded to them provided by the laws of the State of California and of the United States. All defendants are engaged in the enforcement and execution of the laws of the State of California, and more particularly, an alleged peer review process directed to plaintiff at defendant Midway Hospital. As a result of defendants' wrongful conduct, plaintiff has been deprived of his constitutionally protected rights.

90. Defendant BMQA is the "Board of Medical Examiners" as defined by the Health Care Quality Improvement Act of 1986, Section 423, et. seq. § 11133 which provides, in pertinent part:

"Sec. 423. REPORTING OF CERTAIN PROFESSIONAL REVIEW ACTIONS TAKEN BY HEALTH CARE ENTITIES[, 42 U.S.C. § 11133].

(a) REPORTING BY HEALTH CARE ENTITIES. —

(1) ON PHYSICIANS. — Each health care entity which —

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;



\* \* \*

**(3) INFORMATION TO BE REPORTED. —**

The information to be reported under this subsection is —

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) **REPORTING BY BOARD OF MEDICAL EXAMINERS.** — Each Board of Medical Examiners shall report, in accordance with section 424, the information reported to it under subsection (a) and known instances of a health care entity's failure to report information under subsection (a)(1).

\* \* \*

**Sec. 425. DUTY OF HOSPITALS TO OBTAIN INFORMATION,** [42 U.S.C. § 11135].

(a) **IN GENERAL.** — It is the duty of each hospital to request from the Secretary (or the agency designated under section 424(b)), on and after the date information is first required to be reported under section 424(a)) —

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical

privileges at, the hospital, information reported under this part concerning the physician or practitioner, and

(2) once every 2 years information reported under this part concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital.

A hospital may request such information at other times. Sec. 427. **MISCELLANEOUS PROVISIONS**[, 42 U.S.C. § 11137].

(a) **PROVIDING LICENSING BOARDS AND OTHER HEALTH CARE ENTITIES WITH ACCESS TO INFORMATION.** — The Secretary (or the agency designated under section 424(b)) shall, upon request, provide information reported under this part with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner or to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

\* \* \*

(c) **RELIEF FROM LIABILITY FOR REPORTING.** — No person or entity shall be held liable in any civil action with respect to any report made under this part without knowledge of the falsity of the information contained in the report.

(d) **INTERPRETATION OF INFORMATION.** — In interpreting information reported under this

part, a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred."

91. Defendant BMQA is charged with the enforcement of the Health Care Quality Improvement Act of 1986, see Section 423, et. seq.

92. Defendant BMQA asserts that the following is required pursuant to Sections 805 of the California Business and Professions Code and pursuant to Section 423 of the Health Care Quality Improvements Act of 1986:

a. Defendant Midway Hospital, by its administrator, and defendant Dr. Lurvey, as Chief of Staff of Midway Hospital, are required pursuant to Section 805 of the California Business and Professions Code to submit a "Section 805 report" to it.

b. Defendant Midway Hospital is required, pursuant to Section 423 of the Health Care Quality Improvements Act of 1986, to make a "Section 423 report" to it.

c. Absent notice and an opportunity for hearing, the Section 805 report, or the contents thereof, shall, pursuant to Business and Professions Code Section 805.5, be distributed to (a) all health care facilities where plaintiff Dr. Pinhas has staff privileges, upon reappointment to the staff, and (b) all hospitals where Dr. Pinhas may apply for staff privileges.

d. Absent notice and an opportunity for hearing, the Section 423 report, or the contents thereof, shall, pursuant to Section 423 of the Health Care Quality Improvements Act of 1986, be distributed, within two years, to (a) all health care facilities where plaintiff Dr. Pinhas has staff privileges, upon reappointment

to the staff, and (b) all hospitals where Dr. Pinhas may apply for staff privileges.

93. Defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman and Dr. Lurvey have threatened to file and continue to threaten to file a Section 805 report and a Section 423 report.

94. Defendant Midway Hospital's chief executive officer and defendant Dr. Lurvey may claim immunity of the content of the filing of a Section 805 report even if that content is incorrect, misleading or malicious pursuant to Section 805 of the Business and Professions Code.

95. Defendant Midway Hospital and defendant Dr. Lurvey may claim immunity of the content of the filing of a Section 423 report even if that content is incorrect, misleading or malicious pursuant to Section 427 of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11137(c).

96. Dr. Pinhas has no control over the wording that is contained in the Section 805 report or Section 423 report from defendant Midway Hospital and defendant Dr. Lurvey.

97. The Section 805 report and the Section 423 report was, or will be, prepared and the wording was selected within the complete discretion of defendant Midway Hospital and defendant Dr. Lurvey.

98. Defendant Midway Hospital and defendant Dr. Lurvey are not required to submit, in advance, and do not intend to submit, in advance of their filing it with BMQA, the form of Section 805 report or Section 423 report to Dr. Pinhas.

99. Defendant Midway Hospital and defendant Dr. Lurvey are not required to provide Dr. Pinhas, and will



not provide Dr. Pinhas, with a copy of the Section 805 report or the Section 423 report after it has been filed with BMQA.

100. The Section 805 report and the Section 423 report or the content there of shall be distributed to other hospitals, physicians and others pursuant to the statute, regardless of the content of the reports.

101. Any receipt of the Section 805 report or Section 423 report, the maintenance of the Section 805 report or the Section 423 report, or the distribution of the Section 805 report or the Section 423 report, is done with the funds of the State of California, is done pursuant to the authority provided by the statutes of the State of California, more particularly, the California Business and Professions Code Sections 805 and 805.5 and the Health Care Quality Improvements Act of 1986. The obligation of hospitals, to secure information contained in the Section 805 report or Section 423 reports for physicians whose staff privileges are being renewed or who seek staff privileges, is compelled and criminal sanctions may apply to those who do not, pursuant to the laws of the State of California, more particularly the California Business and Professions Code Sections 805 and 805.5 and the Health Care Quality Improvements Act of 1986.

102. It is common practice in California, for every hospital who seeks appointment or reappointment of a physician to the medical staff, to require that the physician disclose whether or not they have had medical staff privileges suspended, terminated, or any action taken thereon.

103. It is common practice in California for hospitals, after the decision in *Elam v. College Park Hospital*, 132 Cal.App.3d 332, 183 Cal.Rptr. 156 (1982) to preclude

admission to the hospital staff if a physician has a report that in any way casts any doubt on his competency to practice medicine or engages in any conduct which may adversely affect patient care.

104. Plaintiff Pinhas contends and seeks the declaration of this Court that § 805 and § 805.5 of the Business and Professions Code of the State of California as interpreted and implemented by the acts of the defendants, including defendant BMQA, violates the Constitution of the United States and more particularly the 14th and 5th Amendments thereto in that Dr. Pinhas' rights to due process of law, the equal protection of the laws and his rights to privacy secured to him by the Constitution of the United States are violated.

105. Defendants contend and seek a declaration to the contrary.

106. Plaintiff Pinhas contends and seeks a declaration of this Court that Section 423 et. seq. of the Health Care Quality Improvements Act of 1986 violates the Constitution of the United States and more particularly the 5th Amendment thereto in that Dr. Pinhas' rights to due process of law, the equal protection of the laws and his rights to privacy secured to him by the Constitution of the United States are violated.

107. Defendants contend and seek a declaration to the contrary.

108. It is necessary and appropriate that this dispute between plaintiff Dr. Pinhas and defendants be adjudicated and determined promptly, so that the parties to this litigation may know their rights and obligations under the laws and Constitution of the United States and because failure to determine this dispute will result in irreparable injury to Dr. Pinhas.



## SECOND CLAIM FOR RELIEF

(For Damages for Violations of Plaintiff's Constitutional Rights and the Civil Rights Act, 42 U.S.C. § 1983 by Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Mr. Posell, Dr. Macy, Dr. Salz, Dr. Perlman, Ms. Farber, Mr. Kadzielski, W&A, and Each of Them)

109. Plaintiff incorporates Paragraphs 1 through 78 and 80 through 103, inclusive, above by reference as though set forth in full herein.

110. Dr. Pinhas has been summarily, knowingly, and intentionally deprived of the status and his property interest in membership on Midway Hospital's medical staff, including admitting and surgical privileges at Midway Hospital, without prior notice or an opportunity to be heard.

111. By virtue of the unjustified and unlawful Peer Review Proceeding which has been commenced and is continuing to be prosecuted against Dr. Pinhas, defendants and each of them have been, are presently, and will be acting under the color of authority and law of the State of California and of the United States. Defendants and each of them claim that they are engaged in the enforcement and execution of the laws of the State of California and the peer review process. Under such circumstances, Dr. Pinhas is entitled to due process rights under the United States Constitution.

112. Defendants, and each of them, by denying Dr. Pinhas representation by counsel, full disclosure with particularity of the charges against Dr. Pinhas and by refusing to take action on plaintiff's request that Dr. Pinhas' Motions be heard and decided at a reasonable time prior to the commencement of the hearing, are acting

in contravention of procedures required by due process. Further, defendants and each of them, by denying plaintiff his right to an unbiased, unprejudiced, detached hearing officer, and by appointing the Judicial Review Committee that consists of members who are in active economic and professional competition with plaintiff and of defendant's own medical staff and subject to the control, persuasion and undue influence of defendants, is further depriving defendant of a fair opportunity to be heard as guaranteed to him by the due process and equal protection clauses of the Constitution of the United States. Further, improper ex parte communications between counsel for the Medical Staff, the hearing officer, the Judicial Review Committee members, the prosecutor, and officers of the Hospital deny plaintiff a fair hearing consistent with due process. Further, defendants' intimidation of witnesses, depriving witnesses of the plaintiff from attending the hearing, threatening plaintiff's counsel with arrest and ordering him off Hospital grounds during the hearing — even though he was listed as a witness, ordering witnesses not to testify to facts helpful to plaintiff Dr. Pinhas, vilifying plaintiff, his physician representative, his witnesses, and interfering with plaintiff's ability to timely get a copy of the transcript of proceedings deprive plaintiff of due process of law.

113. Based on the conduct of defendants, and each of them, as set forth above, Dr. Pinhas has been deprived of his rights in violation of the 5th and the 14th Amendments and Due Process and Equal Protection Clauses of the United States Constitution together with his constitutional right to privacy and has been and will continue to suffer damages in an amount to be determined at the trial of this matter, but in excess of the jurisdictional limits of this Court.

114. As a result of the conduct of defendants and each of them, plaintiff is entitled to reasonable attorneys fees, pursuant to 42 U.S.C. § 1988.

### THIRD CLAIM FOR RELIEF

(For Damages for Violations of the Constitution of the United States and the Civil Rights Act 42 U.S.C. § 1985(3) by Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Mr. Posell, Dr. Macy, Dr. Salz, Dr. Perlman, Ms. Farber, Mr. Kadzielski, W&A, and Each of Them)

115. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 78, 80 through 103 and 110 inclusive, of this First Amended Complaint.

116. Defendants, and each of them, have conspired to deprive plaintiff of equal protection under the laws and of equal privileges and immunities under the laws. In furtherance of this conspiracy, defendants, and each of them, have denied Dr. Pinhas representation by counsel, full disclosure with particularity of the charges against Dr. Pinhas and denied plaintiff's request that Dr. Pinhas' Motions be heard and decided at a reasonable time prior to the commencement of the hearing, and have acted in contravention of procedures required by due process. Further, defendants and each of them, have denied plaintiff his right to an unbiased, unprejudiced, detached hearing officer, and by appointing the Judicial Review Committee that consists of members who are in active economic and professional competition with plaintiff and of defendant's own medical staff and subject to the control, persuasion and undue influence of defendants, has further deprived defendant of a fair opportunity to be heard as guaranteed to him by the due process and equal protection clauses of the Constitution of the United

States. Further, improper ex parte communications between counsel for the Medical Staff, the hearing officer, the Judicial Review Committee members, the prosecutor, and officers of the Hospital have denied plaintiff a fair hearing consistent with due process. Further, defendants' intimidation of witnesses, depriving witnesses of the plaintiff from attending the hearing, threatening plaintiff's counsel with arrest and ordering him off Hospital grounds during the hearing — even though he was listed as a witness, ordering witnesses not to testify to facts helpful to plaintiff Dr. Pinhas, vilifying plaintiff, his physician representative, his witnesses on and off the record before the Judicial Review Committee, and interfering with plaintiff's ability to timely get a copy of the transcript of proceedings has deprived plaintiff of due process of law.

117. As a result of the conduct of defendants, and each of them, plaintiff has suffered property damage to his medical practice, and has suffered the deprivation of his property interest in membership on the Midway Hospital's medical staff, including admitting and surgical privileges, at Midway Hospital. As a consequence, plaintiff has been deprived of his rights in violation of the 5th and 14th Amendments and Due Process and Equal Protections Clauses of the United States Constitution together with the constitutionally protected right of privacy.

118. As a result of the conduct of defendants, and each of them, plaintiff has been damaged in an amount to be determined at the time of trial, but in an amount in excess of the jurisdictional limits of this Court.

119. As a result of the conduct of defendants, and each of them, plaintiff is entitled to reasonable attorneys fees, pursuant to 42 U.S.C. § 1988 of the Civil Rights Act.



#### FOURTH CLAIM FOR RELIEF

(Treble Damages for Violation of the Sherman Anti-Trust Act, Section 1, 15 U.S.C. § 1 by defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, Dr. Perlman, Mr. Kadzielski, W&A and Each of Them)

120. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 78, 80, 84, 90, 91, 93 through 103, and 112, inclusive, of the First Amended Complaint.

121. Defendants Dr. Reader, Dr. Macy, Dr. Salz, Dr. Perlman, and others are engaged in the practice of medicine limited to eye medicine and ophthalmologic surgery and are in competition with plaintiff Dr. Pinhas.

122. Defendants are seeking to effectuate a boycott and drive Dr. Pinhas out of business so that other ophthalmologists and eye physicians, including, but not limited to, defendants Dr. Reader, Dr. Macy, Dr. Salz and Dr. Perlman, will have a greater share of the eye care and ophthalmic surgery in Los Angeles.

123. In an effort to effectuate the boycott and to boycott plaintiff Dr. Pinhas, defendants Dr. Reader, Dr. Macy, Dr. Salz, Dr. Perlman, and others, including, but not limited to, Dr. Lurvey have sought to control and do control defendant Medical Staff. Defendant Mr. Feldman controls Summit Health insofar as it relates to Dr. Pinhas and Midway Hospital.

124. After Dr. Pinhas refused to accept the terms and conditions of the "sham" contract and refused to return a copy of it to Midway Hospital, and after defendant Dr. Lurvey threatened that proceedings may be instituted against him in the event that he sought to utilize this Exhibit "A" in any way detrimental to Midway Hospital, in late March, 1987 Summit Health, Midway Hospital,

Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Perlman entered into a combination and conspiracy to retaliate against Dr. Pinhas and to preclude him from continued competition in the market place, not only at defendant Midway Hospital, but by reason of the filing of an improper Section 805 report and a Section 423 report, preclude plaintiff Pinhas from practicing medicine in California, if not the United States. In furtherance of the conspiracy of defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Pearlman, defendants enlisted the assistance and received the assistance of Mr. Posell, Mr. Kadzielski, and W&A to create unjustified charges, to secure adverse determinations against plaintiff Dr. Pinhas, to cause a summary suspension and termination of his privileges at Midway Hospital and report that summary suspension and termination to the defendant BMQA, and causing dissemination of that adverse determination to all hospitals which Dr. Pinhas is a member, and to all hospitals to which he may apply so as to secure similar actions by those hospitals, thus effectuating a boycott of Dr. Pinhas.

125. Without admission to other hospitals, plaintiff Pinhas has no method by which he can practice ophthalmic surgery, which constitutes the greater portion of his practice.

126. The actions undertaken by defendants in connection with the bringing of false charges against Dr. Pinhas were done with oppression and malice and:

- a. Were not done in a reasonable belief that the action was in furtherance of the quality of health care;



b. Were not done after a reasonable effort to obtain the facts of the matter;

c. Were not done after adequate notice and hearing procedures afforded to Dr. Pinhas, and utilized procedures which were not fair under the circumstances; and

d. Were not based upon the reasonable belief that the action was warranted by the facts after defendants' efforts to obtain facts.

#### FIFTH CLAIM FOR RELIEF

(Injunctive Relief Against All Defendants)

127. Plaintiff realleges and incorporates herein by reference all of the allegations of this First Amended Complaint.

128. Defendants, and each of them, threatened to, and unless restrained will, continue to deprive plaintiff Dr. Pinhas of his right to due process and fair procedure under both the United States Constitution and the Constitution of the State of California.

129. Defendants' conduct has caused, and will continue to cause, plaintiff great and irreparable injury, including, but not limited to, the injury which resulted in the filing of a California Business and Professions Code Section 805.5 notice for which pecuniary damages would not afford adequate relief, in that they would not completely compensate plaintiff's professional reputation and good standing, and would be extremely difficult to ascertain.

WHEREFORE, plaintiff requests judgment to be entered for plaintiff and against defendants, and each of them, as follows:

1. On the First Claim for Relief, for a declaratory judgment that Sections 805 and 805.5 of the California Business and Professions Code and Section 423 et seq of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11133 et seq., are unconstitutional, together with costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

2. On the Second Claim for Relief, for damages according to proof, for costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

3. On the Third Claim for Relief, for damages according to proof, for costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

4. On the Fourth Claim for Relief, for damages according to proof and then trebled, and for costs of suit incurred herein, including reasonable attorneys fees as allowed by law, and for such other and further relief as the Court deems just and proper.

5. On all Claims for Relief an injunction, preliminary, and final, against each and all defendants, their agents, assistants, successors, employees, attorneys, representatives, and all persons acting in concert or cooperation with them or at their direction from violating the right of plaintiff.

JURY TRIAL DEMAND

1. Plaintiff hereby demands trial by jury herein.

DATED: July 13, 1987

LAWRENCE SILVER  
A Law Corporation

By: LAWRENCE SILVER  
*Attorneys for Plaintiff*  
*Simon J. Pinhas, M.D.*

[Exhibits Omitted]

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA }  
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 24, 1990, I served the within Petition For a Writ of Certiorari in Re: "Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Staff, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Johnathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Mark Kadzielski and Weissburg and Aronson, Inc., Petitioners vs. Simon J. Pinhas, M.D., Respondent," in the United States Supreme Court, October Term 1989, No.

on all parties interested in said action, by placing three copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Lawrence Silver, Esq.  
A Law Corporation  
10920 Wilshire Blvd.  
Suite 800  
Los Angeles, CA 90024-6510  
(213) 443-9500  
*Attorney for Respondent*  
*Simon J. Pinhas, M.D.*

Maxwell Blecher  
Blecher & Collins  
611 West Sixth Street  
Suite 2800  
Los Angeles, CA 90017  
(213) 622-4222  
*Attorneys for Respondent*  
*Simon J. Pinhas, M.D.*

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 24, 1990, at Los Angeles, California

Chuck Albrecht

CHUCK ALBRECHT



3  
No. 89-1679

Supreme Court, U.S.

FILED

MAY 31 1990

# In the Supreme Court

JOSEPH F. SPANIOLO, JR.  
CLERK

OF THE

## United States

OCTOBER TERM, 1989

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER, ARTHUR N. LURVEY; RICHARD E. POSELL; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; and WEISSBURG & ARONSON,  
*Petitioners,*

VS.

SIMON J. PINHAS, M.D.  
*Respondent.*

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### BRIEF FOR RESPONDENT IN OPPOSITION

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LAWRENCE SILVER  
A LAW CORPORATION  
LAWRENCE SILVER\*  
10920 Wilshire Boulevard  
Suite 800  
Los Angeles, CA 90024  
(213) 443-9500

BLECHER & COLLINS  
MAXWELL M. BLECHER  
611 WEST SIXTH STREET  
SUITE 2800  
LOS ANGELES, CA 90017  
(213) 622-4222  
*Attorneys for Respondent*

\* Counsel of Record

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## QUESTIONS PRESENTED FOR REVIEW

1. In a hospital staff privileges antitrust case, should this Court agree to review the Ninth Circuit's interpretation of this Court's unanimous decision in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), when there is no conflict between that interpretation and those of the other circuits relied upon by petitioner?

2. In a hospital staff privileges antitrust case, should this Court create and impose a special pleading requirement which would protect only lawyer-defendants and require a complaint to make a variety of particularized allegations concerning lawyer defendants, which special pleading requirement has not heretofore been imposed as to lawyers or any other antitrust defendants?



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No. 89-1679

## In the Supreme Court

OF THE

United StatesOCTOBER TERM, 1989

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPI-  
TAL MEDICAL CENTER, a California general hospital;  
THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL  
CENTER, an unincorporated association; MITCHELL  
FELDMAN; AUGUST READER, ARTHUR N. LURVEY;  
RICHARD E. POSELL; JONATHAN I. MACY; JAMES J.  
SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK  
KADZIELSKI; and WEISSBURG & ARONSON,

*Petitioners,*

VS.

SIMON J. PINHAS, M.D.

*Respondent.*BRIEF FOR RESPONDENT IN OPPOSITIONLIST OF PARTIES

All parties are identified in the List of Parties con-  
tained in the Petition for Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in the  
Appendix to the Petition for Certiorari and is reported as  
*Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024 (9th Cir.  
1990).

## STATEMENT OF THE CASE

In this case, Dr. Simon J. Pinhas, a surgeon, claims that he was deprived of his hospital staff privileges at Midway Hospital Medical Center ("Midway") in Los Angeles in a manner violative of the Due Process Clause of the Fourteenth Amendment and Section 1 of the Sherman Antitrust Act. After Midway convened peer review proceedings against him, he brought suit in U.S. District Court against the hospital, its administrators, their attorneys, and his physician-competitors. The District Court dismissed Pinhas' Complaint.

On appeal, the Ninth Circuit affirmed the dismissal of Pinhas' due process claim but reversed the dismissal of his antitrust claim. As to the due process claim, the Court found that Pinhas had failed to demonstrate that the peer review process initiated by a private hospital sufficiently demonstrated "state action" under the Fourteenth Amendment, relying on this Court's decisions in *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922 (1982) and *Blum v. Yaretsky*, 457 U.S. 991 (1982). As to the antitrust claim, the Court, relying on *Patrick v. Burget*, 486 U.S. 94 (1988), held that the antitrust state action doctrine did not protect peer review decisions from the application of the antitrust laws.

All of the defendants have filed a Petition for Certiorari to this Court seeking to have this Court review the Ninth Circuit's reinstatement of Pinhas' antitrust cause of action. Pinhas has responded with a Brief in Opposition and has also filed a Cross-Petition for Certiorari, asking this Court to consider the dismissal of his due process claim.

## SUMMARY OF ARGUMENT

Petitioners ask this Court to resolve a conflict in the circuits generated by the Ninth Circuit's decision in the instant *Pinhas* decision. The simple response to this request is that there is no conflict and, hence, this Court should not devote its resources to confirm the absence of such a conflict. This Court in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980) set the standard for establishing jurisdiction under the Sherman Act. All federal circuits have used their own words to express their understanding of *McLain* and to apply *McLain* to the myriad fact situations which generate antitrust litigation. That, without more, does not create conflict. Indeed, given the variety of voices through which the circuits speak, there has been general harmony in the circuits' application of *McLain's* precepts.

Petitioners have also urged that this Court use this case as the opportunity to create and impose a special pleading requirement to protect attorneys against antitrust claims. Not only is such a proposal unwise, but this special pleading point is of isolated interest and is not one which should command the attention of this Court.

## ARGUMENT

### I.

## THERE IS NO CONFLICT BETWEEN THE *PINHAS* DECISION AND THE DECISIONS IN OTHER CIRCUITS RELIED ON BY PETITIONERS

In a case packed with significant antitrust and Constitutional issues, petitioners have chosen to limit their request for review to an isolated issue. They focus upon this Court's decision in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980) and claim that the Ninth



Circuit's interpretation of that decision in this case bespeaks a conflict between it and other circuits over the treatment of hospital staff privileges antitrust claims. Petitioners claim that this Court should resolve that conflict. Although a "conflict in the circuits" is a frequently advanced reason for seeking certiorari, petitioners are here attempting to create a conflict where none exists. Certiorari intervention is, thus, not appropriate.

This Court made resoundingly clear in its unanimous *McLain* decision that jurisdiction under the Sherman Act extends not only to activities actually in interstate commerce, but also to activities wholly local in nature which substantially affect interstate commerce. *McLain, supra*, at 242. Respondent here has made the latter claim. Hence, to establish jurisdiction at the pleading stage, respondent must, first, identify a relevant aspect of interstate commerce and, second, show petitioners' activities "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved." *Id.*, at 246.

In *McLain*, real estate purchasers and sellers alleged a conspiracy by real estate brokers to fix real estate commissions. This Court stated that "respondents' brokerage activities" must have a not insubstantial effect on interstate commerce. The question petitioners have chosen to raise is: What did this Court mean by the phrase "respondents' brokerage activities" when it said that to establish the jurisdictional element of a Sherman Act violation it is sufficient to demonstrate a substantial effect on interstate commerce "generated by respondents' brokerage activity"? *Id.*, at 242.

Petitioners claim that the Ninth Circuit has looked to all of defendants' overall or general business activities in answering this question and that this approach puts it at odds with other circuits which have looked only to the

specific conduct alleged to be violative of the antitrust laws. A review of the authorities cited by petitioners shows that there is no conflict between the *Pinhas* decision and the decision of other circuits. Indeed, Ninth Circuit decisions rendered prior to *Pinhas* have shown themselves to be in accord with the other circuits which petitioners reference on this very issue. Let it be clearly said that the circuits do not employ identical words to analyze *McLain* and express their understanding of it. Each speaks with its own voice. Yet there is no disagreement.

The exclusive source for petitioners' claim of a conflict in the circuits is the Ninth Circuit's decision in *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.) *cert. denied*, 449 U.S. 869 (1980) (Kennedy, J.). It is true that there is general language in *Western Waste* which, given an expansive reading, might lead one to conclude that the Ninth Circuit will find that antitrust jurisdiction exists merely on a showing that a defendant's general or overall business activities affect interstate commerce. Yet that conclusion must be placed in context with subsequent Ninth Circuit decisions that have failed to employ any such expansive reading.

*Western Waste* involved a claim brought by one local waste disposal company against another claiming that the latter had attempted to monopolize that business in Phoenix, Arizona. Although *Western Waste* reads *McLain* as allowing jurisdiction to be satisfied if defendant's "rubbish collection business" (*Id.*, at 1097) substantially affected interstate commerce, nevertheless the opinion takes great pains to demonstrate that plaintiff also alleged that the defendant's antitrust violations themselves substantially affected interstate commerce. Although the court might have felt freed by its interpretation of

*McLain* to look only to defendant's general business activity, it nevertheless felt constrained to satisfy itself that the specific complained of activity affected interstate commerce. And it did so. Hence, the result reached in *Western Waste* is consistent with the result which would have been reached under any of the circuit decisions to which petitioners refer.

In a decision rendered shortly after *Western Waste*, the Ninth Circuit articulated its application of *McLain*, an application consistent with the other circuits. In *Palmer v. Roosevelt Lake Log Owners Association, Inc.*, 651 F.2d 1289 (9th Cir. 1981), the Ninth Circuit reviewed the dismissal of a Sherman Act claim brought by a small family business engaged in retrieving logs which were lost and abandoned on Roosevelt Lake while they were being transported by timber companies to local lumber mills. Plaintiff complained that these timber companies were restraining trade in the gathering, transporting and sale of these abandoned logs by warning the lumber mills not to purchase such logs from plaintiff. The Ninth Circuit, in reversing the dismissal of plaintiff's complaint, did refer to the *Western Waste* opinion, but did not rely upon it for its interpretation of *McLain*. Indeed, the *Palmer* court's analysis is remarkably consistent with the interpretation given *McLain* by the other circuits which petitioners here identify.

Thus, the *Palmer* court, in attempting to determine whether the defendants' activities in the case substantially affected interstate commerce, first looked to *McLain* and then expressed its understanding of *McLain* in the following passage:

"... [T]o establish jurisdiction it would be sufficient to show that the defendants' brokerage activities, i.e., that part of the '[defendants]' activities infected by the

price-fixing conspiracy,' had a substantial effect on interstate commerce." *Id.*, at 1291. (Emphasis added.)

And in applying that standard to the fact pattern before it, the court said its task was to determine:

"whether the activities allegedly infected by the unlawful restraint — in this case, the retrieval of salvaged logs on Roosevelt Lake and their sale to lumber mills — have, as a matter of practical economics, a not unsubstantial effect on interstate commerce in Washington lumber and lumber products." *Id.*, at 1292. (Emphasis added.)

Even more recently, in a hospital privileges case, the Ninth Circuit studiously avoided being pinned to any expansive reading of *Western Waste*. *Mitchell v. Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), cert. denied, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1123 (1989). The hospital defendants had argued that it was only its allegedly "infected" activities — not its general business activities — which should be considered in determining whether Sherman Act jurisdiction exists. The plaintiff radiologist had claimed that it was the totality of the Hospital's general business activities which must be considered. Since the court found that plaintiff had failed to establish Sherman Act jurisdiction under either criterion, it did not find it necessary to speak to the continued efficacy of the potentially broad *Western Waste* standard. *Id.*, at 764, n. 1.

The Ninth Circuit's careful insistence that Mitchell's complaint failed to meet either standard and its express refusal to accept a broad reading of *Western Waste* as embodying the Ninth Circuit's law on this jurisdictional issue strongly suggests that the Ninth Circuit does not



apply any such broad test. The *Mitchell* court's failure to rely on *Western Waste* as the Ninth Circuit's rule on this point is all the more telling when one considers that the case discusses decisions from two other Circuits (relied upon by petitioners here) which cite *Western Waste* as expressing the Ninth Circuit rule and evincing a conflict between the circuits. *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 723, n. 3 (10th Cir. 1980); *Hayden v. Bracy*, 744 F.2d 1338, 1343, n. 2 (8th Cir. 1984). The *Mitchell* court showed no interest in agreeing with the other Circuits' surmise.<sup>1</sup>

The Ninth Circuit's decision in the instant case is consistent with the earlier Ninth Circuit decision in *Palmer*. It does not purport to examine whether all of petitioners' activities have an effect on interstate commerce. It does not rely on *Western Waste*. Its analysis is, in fact, consistent with the analysis employed in other Circuits. Thus, Judge Wiggins states that:

"Pinhas must show that 'as a matter of practical economics' the activities of the appellees — the peer review process in general — have a 'not insubstantial

<sup>1</sup>It is worth noting that petitioners have cited no circuit court decision since *Mitchell* which views the Ninth Circuit as creating a split in the circuits. Although several of the circuit court cases cited by petitioners expressed a belief that the Ninth Circuit's view of *McLain* gives rise to a split in the circuits, only one refers to any case in the Ninth Circuit other than *Western Waste* or rendered since then to posit such a conflict. The sole exception is *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984). Although it cites to *Western Waste* as a source of the conflict, it also erroneously cites *Hahn v. Oregon Physician Service*, 689 F.2d 840 (9th Cir. 1983) for this belief. *Hahn*, however, which focuses upon "defendants' relevant activities", not the totality of defendants' activities, is consistent with *Palmer*, not a broad interpretation of *Western Waste*. *Id.*, 689 F.2d at 844.

effect on the interstate commerce involved.' " *Pinhas, supra*, at 1032. (Emphasis added.)

The Ninth Circuit's opinion in this case is not referring to all of the defendants' general or overall business activities, but only those specific activities which have been "infected" by the illegality. *McLain, supra*, 444 U.S. at 246. The Ninth Circuit's opinion in this case is consistent with the articulated standard for the actionable antitrust injury. The Ninth Circuit's opinion in this case is not in conflict with the opinions of other circuits.

Thus, when the Second Circuit in *Furlong v. Long Island College Hospital*, 710 F.2d 922, 926 (2d Cir. 1983) identifies its standard as:

"whether the defendants' activity that has allegedly been 'infected' by unlawful conduct can be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved.' " (Emphasis supplied),

it is employing no different formula than the Ninth Circuit in *Palmer* and *Pinhas*.<sup>2</sup>

<sup>2</sup>The Second Circuit's view has been expressly adopted by the Seventh Circuit (*Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985)) and the Sixth Circuit (*Stone v. William Beaumont Hospital*, 782 F.2d 609, 614 (6th Cir. 1986)). A similar form of words is employed in the Eighth Circuit where plaintiff must show that the "challenged conduct" affected interstate commerce. *Hayden v. Bracy*, 744 F.2d 1338, 1343, n. 2. (8th Cir. 1984). See also *Cordova & Simonpieti Insurance Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 45 (1st Cir. 1981) where it is the defendant's infected activities which are examined.



Moreover, when the Tenth Circuit said in *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 723 (10th Cir. 1981):

"In context, then, the Court [in *McLain*] was referring to the *challenged* activities, not the brokers' overall business, by its reference to 'respondents' brokerage activities' in the passage Dr. Crane relies upon." (emphasis in original),

it was saying nothing substantively different than what the Ninth Circuit said in *Palmer* when it interpreted *McLain's* reference to "defendants' brokerage activities" to mean "that part of the '[defendants]' activities infected by the price-fixing conspiracy." *Palmer, supra*, 651 F.2d at 1291. The *Palmer* analysis was expressly followed in the instant case.

Indeed, in every case, as the Tenth Circuit noted, "[t]he analytical focus continues to be on the nexus, assessed in practical terms, between interstate commerce and the challenged activity." *Crane, supra*, 637 F.2d at 724. As the Ninth Circuit recognized in *Mitchell, supra*, 853 F.2d at 765, "[W]hether a hospital's activities sufficiently affect interstate commerce to create Sherman Act jurisdiction is a highly fact-based question calling for common sense judgment." Each circuit in applying *McLain* to a hospital staff privileges case must employ its own common sense judgment and apply this Court's guidance to those factual questions. The use of different words by different circuits to express their understanding of that guidance does not, without more, give rise to a conflict in the circuits warranting certiorari review. On the issue raised, there is no fundamental dispute between the Ninth Circuit and the other circuits relied upon by petitioner. This Court should deny the petition for certiorari.

## II.

### THIS COURT SHOULD NOT CREATE AND IMPOSE A SPECIAL PLEADING REQUIREMENT TO PRO- TECT ATTORNEYS FROM ANTITRUST CLAIMS

The second issue which petitioners have framed for review is striking, not simply because it appears to be a matter of personal interest and benefit only to the lawyers among and lawyers for the petitioners, but also because it asks this Court to establish a special pleading requirement for any antitrust claim brought against a lawyer.

Petitioners assert that this Court should review the refusal of the Court of Appeals to uphold the dismissal of Pinhas' antitrust claim directed against the Hospital's attorneys because their lawyers were only acting as agents of the Hospital's parent company. They insist that their lawyers should receive the benefit of a protectionist special pleading requirement which they would have imposed on prospective antitrust plaintiffs — a special pleading requirement which would require a "particularized allegation that counsel had a separate economic interest, and were separate economic actors, and find that assertions that counsel were enlisted to provide assistance are inadequate to state a viable antitrust claim." Petition for Certiorari at page 13. They do not, at present, insist that attorneys be immunized from antitrust liability!

The Ninth Circuit made short shrift of this argument. So too should this Court. An attorney is not immune from antitrust liability if he becomes an active participant in formulating policy decisions with his client to restrain competition. *Tillamook Cheese & Dairy Association v. Tillamook County Creamery Association*, 358 F.2d 115 (9th Cir. 1966). The Ninth Circuit found that at this pleading

stage, Pinhas had sufficiently alleged that the attorneys "exerted their influence over Summit Health and Midway so as to direct them to engage in the complained of acts for an anticompetitive purpose." *Pinhas, supra*, 894 F.2d at 1033. This is more than agency. Plaintiff's First Amended Complaint, paragraphs 12, 17, 18, 37, 47, 53, 54, 55, 63 and 124 (App., at A-39, A-41, A-47, A-49, A-51, A-53, A54, A-74 and A-75) sufficiently alleges conduct by the attorneys petitioners which goes beyond mere agency and constitutes active participation in the policy decision engaged in by the other petitioners to violate respondent's rights under the antitrust laws. *Brown v. Donco Enterprises, Inc.*, 783 F.2d 644 (6th Cir. 1986).<sup>3</sup>

Moreover, as this Court recognized in *McLain*,

"It is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief' [citation] This rule applies with no less force to a Sherman Act claim . . ." *McLain, supra*, 444 U.S. at 246.

There is no reason to carve out an exemption from antitrust liability for attorneys. The protectionist special pleading requirement which the petitioners seek for their lawyers would have just such an effect. Nor should this Court disturb the healthy pleading standard set forth in *Conley v. Gibson*, 355 U.S. 41 (1957) and easily met in the instant case. There is no reason why this Court should grant review to examine an issue which is of isolated interest to only some of the petitioners in this case.

<sup>3</sup>The substantial exhibits incorporated by reference into the First Amended Complaint, but not reprinted in the Appendix to the Petition, further amplify the actionable antitrust role of the attorney petitioners.

## CONCLUSION

For the reasons set forth herein, this Court should deny the Petition for Certiorari.

DATED: May 29, 1990

Respectfully Submitted,

LAWRENCE SILVER  
A Law Corporation  
and LAWRENCE SILVER  
and  
BLECHER & COLLINS  
and MAXWELL BLECHER

By: \_\_\_\_\_  
Lawrence Silver,  
Attorneys for Respondent  
Simon J. Pinhas, M.D.

In The  
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October Term, 1989

Supreme Court, U.S.  
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SUMMIT HEALTH, LTD., MIDWAY HOSPITAL  
MEDICAL CENTER, THE MEDICAL STAFF OF  
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FELDMAN, AUGUST READER, M.D., ARTHUR N.  
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MARK KADZIELSKI and WEISSBURG  
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*Petitioners,*

vs.

SIMON J. PINHAS, M.D.,

*Respondent.*

**BRIEF OF THE CALIFORNIA ASSOCIATION  
OF HOSPITALS AND HEALTH SYSTEMS AS AMICUS  
CURIAE IN SUPPORT OF PETITION FOR  
A WRIT OF CERTIORARI**

**CALIFORNIA ASSOCIATION OF HOSPITALS  
AND HEALTH SYSTEMS**

CHRISTINE R. HALL, General Counsel

MUSICK, PEELER & GARRETT

JAMES E. LUDLAM

CHARLES F. FORBES

WILLIAM MCD. MILLER III

HORVITZ & LEVY

ELLIS J. HORVITZ

DAVID S. ETTINGER\*

15760 Ventura Boulevard, 18th Floor

Encino, California 91436

(818) 995-0800 and (213) 872-0802

*Attorneys for Amicus Curiae*  
*California Association of Hospitals and Health Systems*

**\*Counsel of Record**



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No. 89-1679

In The

## Supreme Court of the United States

October Term, 1989

SUMMIT HEALTH, LTD., MIDWAY HOSPITAL  
MEDICAL CENTER, THE MEDICAL STAFF OF  
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FELDMAN, AUGUST READER, M.D., ARTHUR N.  
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JAMES J. SALZ, M.D., GILBERT PERLMAN, M.D.,  
MARK KADZIELSKI and WEISSBURG  
and ARONSON, INC.,

*Petitioners,*

vs.

SIMON J. PINHAS, M.D.,

*Respondent.*

BRIEF OF THE CALIFORNIA ASSOCIATION  
OF HOSPITALS AND HEALTH SYSTEMS AS AMICUS  
CURIAE IN SUPPORT OF PETITION FOR  
A WRIT OF CERTIORARI

## INTEREST OF AMICUS CURIAE

Counsel for both petitioners and respondent have  
consented to the filing of this brief. The consents are  
being filed with this Court.



The California Association of Hospitals and Health Systems (CAHHS) represents approximately 540 California hospitals, the vast majority of the hospitals in California. CAHHS submitted an amicus curiae brief in this case in the Ninth Circuit in support of defendants' petition for rehearing and suggestion for rehearing en banc.

CAHHS has a vital interest in the present case because the case decides issues of great importance to California hospitals. Specifically, the issues concern when and under what circumstances a physician can bring a Sherman Act antitrust action in federal court based on the denial of that physician's staff privileges. CAHHS respectfully submits its amicus curiae brief is helpful because it explains the importance of this case beyond the effect it has on the immediate parties.

---

### SUMMARY OF ARGUMENT

The Ninth Circuit has allowed a physician to proceed with a Sherman Act antitrust action based on the termination of his hospital staff privileges, a type of case that has been said to be "at best at the very margin of the Sherman Act's coverage." *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 927 (2d Cir. 1983). The Ninth Circuit applied this Court's opinion in *Patrick v. Burget*, 486 U.S. 94 (1988) and held that, like Oregon in *Patrick*, California does not sufficiently supervise the hospital peer review process to shield peer review participants from antitrust liability under the state action doctrine. *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1028-1030 (9th Cir. 1989).

The Court of Appeals, however, also addressed an issue not raised in *Patrick*, whether plaintiff has alleged a nexus with interstate commerce sufficient to establish jurisdiction under the Sherman Act. It is this issue in particular which merits this Court's attention. The interstate commerce jurisdictional issue is appropriate for this Court's review for two reasons: (1) the circuits are in conflict on the issue and (2) resolution of the conflict will likely determine whether a large number of cases, particularly those involving denial of hospital staff privileges, will be brought in state courts or in federal court. The conflict arises from a difference in interpretation of this Court's opinion in *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980).

The Ninth Circuit's opinion in this case follows the circuit's longstanding interpretation of *McLain* (albeit for the first time in a staff privileges case) that the Sherman Act jurisdictional requirement is satisfied merely by showing the defendant's general business activities, not necessarily the alleged anticompetitive conduct, affect interstate commerce. Thus, the court held plaintiff "need not . . . [show] the effect on interstate commerce caused by the alleged conspiracy to keep *him* from working," but only "that 'as a matter of practical economics' the activities of the appellees – the peer review process *in general* – have a 'not insubstantial effect on the interstate commerce involved.'" *Pinhas v. Summit Health, Ltd.*, 894 F.2d at 1032 (emphasis added). The Third and Eleventh Circuits are generally in accord with this view. In contrast, the Tenth Circuit, followed by the First, Second, Sixth, Seventh, Eighth, and, possibly, the Fourth Circuits, has

held, "we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus, assessed in practical terms, between interstate commerce and the challenged activity." *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 724 (10th Cir. 1981) (en banc).

Choosing between these different approaches will significantly impact the number of staff privileges cases that can be brought in federal court as Sherman Act actions rather than in state court. Denying hospital privileges to a single physician rarely will affect interstate commerce, while the general business activities of a hospital frequently will. Moreover, if the jurisdictional rule is resolved so as to give physician plaintiffs the option to maintain their staff privileges cases as Sherman Act actions, they will most likely opt for the federal forum, at least in California, because of significant procedural advantages federal court offers.

Finally, we discuss briefly why the Ninth Circuit's interpretation of *McLain* should be rejected in favor of that of the majority of the circuits. Focusing on the interstate commerce impact of a defendant's general business activities rather than of the particular alleged anticompetitive conduct will lead to arbitrary and disparate results unconnected to the purposes of the Sherman Act.

---

## ARGUMENT

### I.

**CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER THE SHERMAN ACT JURISDICTIONAL REQUIREMENT CAN BE SATISFIED WITHOUT SHOWING THAT THE PARTICULAR ALLEGED ANTITRUST VIOLATION AFFECTS INTERSTATE COMMERCE.**

Ten years ago, this Court held Sherman Act jurisdiction could be established by showing that "the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 242 (1980). Under the latter test, a split soon developed among the circuits concerning whether the "defendants' activity" which must affect interstate commerce is the defendants' general business activities or the specific anticompetitive conduct.

Within two months of the *McLain* opinion, the Ninth Circuit interpreted *McLain* as holding "that it was not necessary for the alleged antitrust violations complained of to have affected interstate commerce as long as defendants' business activities, independent of the violations, affected interstate commerce." *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.), cert. denied, 449 U.S. 869 (1980). Less than a year later, the Tenth Circuit came to the opposite conclusion, holding that "we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus, assessed in



practical terms, between interstate commerce and the challenged activity." *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 724 (10th Cir. 1981) (en banc).

In the intervening years, the Third and Eleventh Circuits have lined up with the Ninth, see *Miller v. Indiana Hosp.*, 843 F.2d 139, 144 n. 5 (3d Cir.), cert. denied, 109 S.Ct. 178 (1988); *Cardio-Medical Assoc. v. Crozer-Chester Medical Center*, 721 F.2d 68, 74-75 (3d Cir. 1983); *Shahawy v. Harrison*, 778 F.2d 636, 638-641 (11th Cir. 1985), and the First, Second, Sixth, Seventh, Eighth, and, possibly, the Fourth Circuits have sided with the Tenth, see *Cordova & Simon-pietri Ins. v. Chase Manhattan Bank*, 649 F.2d 36, 44-45 (1st Cir. 1981); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 925-926 (2d Cir. 1983); *Thompson v. Wise Gen. Hosp.*, 707 F.Supp. 849, 855 (W.D.Va. 1989), aff'd without published opinion, 896 F.2d 547 (4th Cir. 1990);<sup>1</sup> *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613-614 (6th Cir. 1986); *Sarin v. Samaritan Health Center*, 813 F.2d 755, 758 (6th Cir. 1987); *Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985); *Doe on Behalf of Doe v. St. Joseph's Hosp.*, 788 F.2d 411, 417 (7th Cir. 1986); *Hayden v. Bracy*, 744 F.2d 1338, 1342-1343 (8th Cir. 1984); *Pariser v. Christian Health Care Systems*, 816 F.2d 1248, 1252-1253 (8th Cir. 1987); see also *P. Areeda & H. Hovenkamp*, *Antitrust Law* ¶ 232.1c, at 238-239 (Supp. 1989).<sup>2</sup>

<sup>1</sup> Although the Fourth Circuit affirmed the district court in an unpublished opinion, that opinion may under certain circumstances be cited in the Fourth Circuit for its precedential value. See 4th Cir. R. I.O.P. 36.5. That is why we describe the Fourth Circuit as "possibly" aligned with the Tenth.

<sup>2</sup> Not only is there disagreement among the circuits, there is disagreement within the circuits as well. Some of the

(Continued on following page)

Thus, by 1985, it was obvious that "[m]uch dispute exists in the federal circuits over the content of the elements of the Sherman Act jurisdictional inquiry." *Shahawy v. Harrison*, 778 F.2d at 639. And, as one judge has noted, "In the absence of more definitive guidance from the Supreme Court, it is likely that courts will continue to be divided . . . ." *Stone v. William Beaumont Hosp.*, 782 F.2d at 620 (Holschuh, D.J., concurring); see *id.* at 613 ("The Supreme Court . . . has provided no additional guidance which would resolve the disparity between the circuits").

The instant case presents this Court with an ideal opportunity to give the "definitive guidance" requested by the divided Courts of Appeals. In an action brought by a physician complaining of the termination of his hospital staff privileges, the Court of Appeals here followed the Ninth Circuit "general business activities" rule,<sup>3</sup> holding that to satisfy the Sherman Act's jurisdictional requirement the plaintiff "need not . . . [show] the effect on interstate commerce caused by the alleged conspiracy to keep him from working," but only "that 'as a matter of practical economics' the activities of the appellees -- the

(Continued from previous page)

opinions rejecting the Ninth Circuit approach have come over strong dissents. See, e.g., *Stone v. William Beaumont Hosp.*, 782 F.2d at 621-623 (Martin, J., concurring in the judgment); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d at 727-728 (Holloway, J., concurring and dissenting).

<sup>3</sup> In addition to *Western Waste*, see *Parks v. Watson*, 716 F.2d 646, 661 (9th Cir. 1983); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818-819 (9th Cir.), cert. denied, 456 U.S. 1011 (1982); see also *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762, 764 (9th Cir. 1988), cert. denied, 109 S.Ct. 1123 (1989).



peer review process *in general* – have a ‘not insubstantial effect on the interstate commerce involved.’ ” *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1032 (9th Cir. 1989) (emphasis added).

Thus, the issue is squarely presented.

## II.

### RESOLUTION OF THE JURISDICTIONAL ISSUE DETERMINES WHETHER MANY ACTIONS BROUGHT BY PHYSICIANS CONCERNING TERMINATION OR RESTRICTION OF THEIR HOSPITAL STAFF PRIVILEGES WILL BE BROUGHT IN STATE OR FEDERAL COURT.

Deciding the jurisdictional issue presented by this case involves more than just resolving the conflict in the circuits for the sake of resolving a conflict. It is not a mere academic exercise, but will have a substantial effect on whether a large number of cases will be filed in federal court instead of state court. In this section, we explain that choosing between the Ninth Circuit and Tenth Circuit approaches will be the difference between life and death of many Sherman Act cases, particularly the “‘burgeoning number of cases’ brought by private physicians under the antitrust laws challenging their exclusion from hospital staff privileges,” Comment, *Sherman Act “Jurisdiction” In Hospital Staff Exclusion Cases*, 132 U. Pa. L. Rev. 121, 122 (1983) (footnotes omitted).<sup>4</sup> We also show

<sup>4</sup> Other commentators also have noted the growing number of staff privileges actions being brought under federal  
(Continued on following page)

that, if physician plaintiffs have the option to bring their staff privileges actions in federal court, they will, at least in California, invariably choose that option rather than state court.

In a staff privileges case, a district court recently stated that this Court’s *McLain* opinion “has spawned two lines of cases, the first more likely than the second to sustain a plaintiff’s jurisdictional allegations.” *Litman v. A. Barton Hepburn Hosp.*, 679 F.Supp. 196, 200 (N.D.N.Y. 1988). This is an understatement. The termination or restriction of one physician’s hospital staff privileges will rarely have a sufficient effect on interstate commerce to invoke the Sherman Act’s jurisdiction, but the general business activities of a hospital will rarely *not* have that jurisdiction-satisfying effect.<sup>5</sup> In any event, “Privilege denials that affect only individual practitioners or local

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(Continued from previous page)

antitrust laws. See Carlson, *Physician Credentialing Decisions and the Sherman Act*, 18 Cumb. L. Rev. 419, 419 (1988) (“Physicians who are denied hospital privileges are increasingly turning to federal antitrust laws for relief”); Note, *Quality of Care, Staff Privileges, and Antitrust Law*, 64 U. Det. L. Rev. 505, 506 (1987) (“antitrust litigation involving physician staff privileges has become a very active area”); Enders, *Federal Antitrust Issues Involved in the Denial of Medical Staff Privileges*, 17 Loy. U. Chi. L. J. 331, 331 (1986) (“in recent years no single health care industry practice has been the target of more antitrust lawsuits than hospital denial of medical staff privileges”).

<sup>5</sup> There are unusual exceptions. See *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d at 764-766 (no Sherman Act jurisdiction in case involving 38-bed facility “located in a remote area of northern California over 150 miles from either the Oregon or Nevada borders and over 100 miles from the nearest significant urban center”).

communities of practitioners raise the most difficult cases for the interstate commerce test, and these cases invite different results under different approaches." Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. 595, 637 (1982).

The Court of Appeals has recognized that the choice of jurisdictional rule is crucial to many staff privileges actions. The Seventh Circuit accurately noted the stakes involved:

"Failure to uphold the dismissal of the instant complaint on the ground of lack of any allegations regarding a plausible nexus with interstate commerce would mean that virtually every physician who is ever temporarily denied hospital privileges for whatever reason could drag the hospital and members of its staff into costly antitrust litigation [6] merely by alleging that the defendant receives payments, goods, or equipment in interstate commerce. We decline to encourage this procedure." *Seglin v. Esau*, 769 F.2d at 1283-1284.

Not only could every disgruntled physician drag the hospital and its medical staff into costly antitrust litigation, it will be the rare physician who does not do so and who chooses state court instead. Consider the factors a California physician will evaluate in choosing his or her forum:

<sup>6</sup> In the present case, not only the hospital and its medical staff are defendants, but so too are the hospital's attorneys, the peer review hearing officer, an employee in the hospital's risk management section, the hospital chief of staff, an officer of the hospital's corporate parent, and several individual physicians.

1. In state court, before a plaintiff can even file a damages action for denial or restriction of staff privileges, he or she must exhaust all administrative remedies within the hospital and then obtain from a court a reversal of the staff privileges decision. *Westlake Community Hosp. v. Superior Court*, 17 Cal.3d 465, 131 Cal.Rptr. 90, 551 P.2d 410 (1976). In a federal antitrust action, as the present case holds, there is no such requirement; to the contrary, suit can be filed even before hospital peer review proceedings are complete. See *Pinhas v. Summit Health, Ltd.*, 894 F.2d at 1030-1031.

2. In state court, a physician plaintiff in a damages action cannot obtain discovery of important peer review committee "proceedings" and "records." Cal. Evid. Code, § 1157; *California Eye Institute v. Superior Court*, 215 Cal.App.3d 1477, 264 Cal.Rptr. 83 (1989), review denied (Feb. 21, 1990); *St. Francis Memorial Hospital v. Superior Court*, 205 Cal.App.3d 438, 252 Cal.Rptr. 380 (1988). In a federal antitrust action, on the other hand, the state discovery immunity would be inapplicable and discovery would probably be ordered under federal law. *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981); see recently, e.g., *Wei v. Bodner*, 127 F.R.D. 91, 98-100 (D.N.J. 1989). This distinction alone would likely be sufficient reason to opt for federal court. Denying discovery of peer review committee matters "may very well prevent [an antitrust plaintiff] from bringing his action altogether." *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d at 1063; see similarly *California Eye Institute v. Superior Court*, 215 Cal.App.3d at 1485-1486.

3. In federal antitrust actions, successful plaintiffs are entitled to treble damages and attorney's fees, 15



U.S.C. § 15(a) (Supp. 1989), remedies not available in state staff privileges damage actions. This, too, is a compelling magnetic pull to federal court.<sup>7</sup>

Thus, the Ninth Circuit's application of its "general business activities" jurisdictional rule to hospital staff privileges cases could well lead to a wholesale shifting of those cases from the state to the federal courts.

### III.

#### **CERTIORARI SHOULD BE GRANTED TO RESOLVE THE DISPUTE AMONG THE CIRCUITS IN FAVOR OF THE MAJORITY RULE REQUIRING A NEXUS BETWEEN INTERSTATE COMMERCE AND THE ALLEGED ANTICOMPETITIVE ACT.**

We have so far explained why certiorari should be granted in this case: the issue presented has divided the circuits and its resolution will have a profound impact on the number of Sherman Act cases on federal court dockets. We now briefly discuss why, if certiorari is granted,

<sup>7</sup> The legislation is not retroactively applicable to the present case, but a California physician now would also consider the qualified immunity provided to peer review participants by the Health Care Quality Improvement Act of 1986. 42 U.S.C. §§ 11111(a), 11112(a). However, California has a similar conditional peer review immunity, Cal. Civ. Code, § 43.7(b), which does not appear to be any more favorable to plaintiffs. The Health Care Quality Improvement Act of 1986 does not affect the jurisdictional issue presented here, although it does indicate that the Ninth Circuit's broad jurisdictional rule is contrary to public policy. In the Act, Congress specifically found that "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101(4).

the Ninth Circuit's jurisdictional rule should be rejected in favor of that of the majority of the circuits.

Cases like the present one have been correctly described as "at best at the very margin of the Sherman Act's coverage . . . ." *Furlong v. Long Island College Hosp.*, 710 F.2d at 927. Courts in other staff privileges cases have similarly stated that "it is 'hard to ignore the suspicion that the facts of this case have been forced into an anti-trust mold to achieve federal jurisdiction,'" *Seglin v. Esau*, 769 F.2d at 1280, n. 6, and that "the courts should not allow plaintiffs, by charging conspiracies in restraint of trade, to turn every case into a Sherman Act matter," *Thompson v. Wise Gen. Hosp.*, 707 F.Supp. at 855.

Simply stated, cases like the present one, involving alleged anticompetitive conduct against a single physician which has no discernible impact on interstate commerce, should not activate the heavy machinery of the federal antitrust laws. The interstate commerce jurisdictional requirement should screen such cases out of the federal courts. Yet, it has been said that the Ninth Circuit's jurisdictional rule "would in essence eliminate the interstate commerce test from antitrust law, since the total activities of virtually any defendant, no matter how local its business, are likely to have some effects upon interstate commerce." Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. at 632-633.

Even if the Ninth Circuit rule would not make the finding of jurisdiction a foregone conclusion in every case, it would nonetheless lead to arbitrary results unconnected with the purposes of the Sherman Act. As the First



Circuit has noted, "the most local of conspiracies would fall inside, or outside, the Sherman Act, depending upon the fortuitous circumstance of whether a defendant firm happened to be owned by an interstate conglomerate." *Cordova & Simonpietri Ins. v. Chase Manhattan Bank*, 649 F.2d at 45. Thus, although the termination of plaintiff's staff privileges in this case may have had the same negligible impact on interstate commerce as the actions taken against the plaintiff physician in *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762 (see n. 5, *ante*), since the *Mitchell* plaintiff practiced at a small, rural hospital which did not substantially affect interstate commerce while plaintiff here practiced at a hospital which apparently did, one case remains in federal court and the other does not.

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## CONCLUSION

For the foregoing reasons, defendants' petition for writ of certiorari should be granted.

Respectfully submitted,

CALIFORNIA ASSOCIATION OF  
HOSPITALS AND HEALTH  
SYSTEMS

CHRISTINE R. HALL,  
General Counsel

MUSICK, PEELER & GARRETT

JAMES E. LUDLAM

CHARLES F. FORBES

WILLIAM McD. MILLER III

HORVITZ & LEVY

ELLIS J. HORVITZ

DAVID S. ETTINGER

*Attorneys for Amicus Curiae  
California Association of  
Hospitals and Health Systems*

# In the Supreme Court

## OF THE United States

OCTOBER TERM, 1989

SUMMIT HEALTH, LTD., MIDWAY HOSPITAL MEDICAL  
CENTER, THE MEDICAL STAFF OF MIDWAY HOSPITAL  
MEDICAL CENTER, MITCHELL FELDMAN, AUGUST  
READER, M.D., ARTHUR N. LURVEY, M.D., JONATHAN I.  
MACY, M.D., JAMES J. SALZ, M.D., GILBERT  
PERLMAN, M.D., MARK KADZIELSKI and  
WEISSBURG AND ARONSON, INC.,  
*Petitioners,*

VS.

SIMON J. PINHAS, M.D.,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

### JOINT APPENDIX

J. MARK WAXMAN\*  
TAMI S. SMASON  
WEISSBURG AND ARONSON, INC.  
ATTORNEYS AT LAW  
2049 Century Park East  
Suite 3200  
Los Angeles, California 90067  
(213) 277-2223  
*Counsel for Petitioners*

LAWRENCE SILVER\*  
LAWRENCE SILVER  
A LAW CORPORATION  
10920 Wilshire Boulevard  
Suite 800  
Los Angeles, California 90024  
(213) 443-9500  
BLECHER & COLLINS  
611 West Sixth Street  
28th Floor  
Los Angeles, California 90017  
(213) 622-4222  
*Counsel for Respondent*

\*Counsel of Record

PETITION FOR CERTIORARI FILED  
APRIL 24, 1990  
CERTIORARI GRANTED JUNE 18, 1990

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<p>Petitioners designate <i>Pinkas v. Summit Health, Ltd., et al.</i>, No. 87-6530 (9th Cir. 1990) to be a part of this Appendix. This opinion has already been printed at p. A-1 of the Petition for Certiorari in this case.</p>	

## RELEVANT DOCKET ENTRIES

May 21, 1987 — Filed Complaint. Issued Summons.

July 13, 1987 — First Amended Complaint and Jury Demand. Issued Summons.

October 7, 1987 — Order dismissing defendant State of California Board of Medical Quality Assurance without prejudice, pursuant to stipulation, entered.

October 7, 1987 — Ordered, adjudged and decreed that plaintiff's complaint against Summit Health, Ltd., Midway Hospital Medical Center, the Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Richard E. Posell, Jonathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc. is hereby dismissed without leave to amend (entered October 9, 1987).

October 22, 1987 — Plaintiff filed notice of appeal to Ninth Circuit Court of Appeals from order entered October 9, 1987.

February 22, 1990 — Mandate from Ninth Circuit Court of Appeals affirming in part and reversing in part and remanding the judgment of the United States District Court.

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
NO. 8703292 FFF (GHKx)

SIMON J. PINHAS, M.D.,

*Plaintiff,*

vs.

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER; ARTHUR N. LURVEY; RICHARD E. POSELL, JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; WEISSBURG AND ARONSON, INC; and STATE OF CALIFORNIA BOARD OF MEDICAL QUALITY ASSURANCE,  
*Defendants.*

**FIRST AMENDED COMPLAINT FOR VIOLATION  
OF CONSTITUTIONAL RIGHTS AND CIVIL  
RIGHTS (42 U.S.C. § 1983 and § 1985(3)); DECLARATORY  
JUDGMENT AND TREBLE DAMAGES FOR  
VIOLATION OF SECTION 1 OF THE SHERMAN  
ANTI-TRUST ACT AND INJUNCTIVE RELIEF**

**DEMAND FOR JURY TRIAL**

LAWRENCE SILVER, A LAW CORPORATION

LAWRENCE SILVER

9100 Wilshire Boulevard, Suite 3600

Beverly Hills, California 90212

*Attorneys for Plaintiff*

*Simon J. Pinhas, M.D.*

### STATEMENT AS TO JURISDICTION

1. This civil action arises under the Constitution of the United States and 42 U.S.C. § 1983, § 1985, and § 1988; 28 U.S.C. § 2201 and § 2202, and 15 U.S.C. § 1.

2. This court has jurisdiction of the action under 28 U.S.C. § 1331, § 1337 and § 1343, and 15 U.S.C. § 4 and § 15.

3. The matter in controversy exceeds Ten Thousand Dollars (\$10,000), exclusive of interest and costs.

### VENUE

4. Venue is proper pursuant to 28 U.S.C. §§ 1391 and 1392.

### PARTIES

5. Plaintiff, Simon J. Pinhas, M.D., ("Dr. Pinhas") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon. Plaintiff presently, and at all times stated herein, was a Board certified surgeon, having been certified in 1982. Plaintiff has been engaged in the practice of medicine and surgery since 1977 and as such as engaged in interstate commerce. Until the grievances hereinafter complained of, plaintiff was a member, in good standing, of the defendant Medical Staff of Midway Hospital. Plaintiff is a citizen of the United States and a resident of the State of California and this judicial district.

6. Defendant Summit Health Ltd. ("Summit Health") is a corporation authorized to do business pursuant to the laws of the State of California and is the parent of

Midway Hospital and Medical Center. Summit Health is engaged in interstate commerce and owns and operates approximately 19 hospitals and 49 nursing home facilities in California, Arizona, Colorado, Oregon, Iowa, Washington, Texas and Saudi Arabia.

7. Defendant Midway Hospital Medical Center ("Midway Hospital") is engaged in interstate commerce and is a general hospital organized and existing pursuant to the laws of the State of California and conducts its business by providing medical facilities and medical care in Los Angeles, California.

8. Defendant Medical Staff of defendant Midway Hospital ("Medical Staff") is an unincorporated association of physicians engaged in interstate commerce practicing medicine at Midway Hospital with its principal place of activity located at Los Angeles, California. Defendant Medical Staff, in a conspiracy with other defendants, has wrongfully summarily suspended plaintiff and has commenced and prosecuted an unjustified, illegal and unconstitutional peer review proceeding ("Peer Review Proceeding") against plaintiff.

9. Mitchell Feldman ("Mr. Feldman") at all times mentioned herein was the regional vice-president of defendant Summit Health, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

10. Defendant August Reader, M.D. ("Dr. Reader") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye



physician and ophthalmological surgeon and is competition with plaintiff Dr. Pinhas. Dr. Reader is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

11. Defendant Arthur Lurvey, M.D. ("Dr. Lurvey") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and at all times mentioned herein was the Chief of Staff of Midway Hospital. Dr Lurvey is engaged in interstate commerce, is a citizen of the United States, resident of the State of California and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

12. Defendant Richard E. Posell ("Mr. Posell") is, and at all times herein mentioned was engaged in interstate commerce and was, an attorney at law, duly admitted and practicing law in the State of California and is a citizen of the United States, resident of the State of California and a resident of this judicial district, and has caused, directly or indirectly, the prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

13. Defendant Jonathan I. Macy, M.D. ("Dr. Macy") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in compe-

tition with plaintiff Dr. Pinhas. Dr Macy is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

14. Defendant James J. Salz, M.D. ("Dr. Salz") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr. Salz is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

15. Defendant Gilbert Perlman, M.D. ("Dr. Perlman") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr. Perlman is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

16. Defendant Peggy Farber ("Ms. Farber") is employed by defendants Summit Heath and Midway Hospital in their Risk Management Section. At the direction of her employers and others, she was charged with (a) securing the information which was placed in the false charges brought against Dr. Pinhas and (b) interfering with Dr. Pinhas' defense against those charges at the Peer Review Proceedings. Ms. Farber is a citizen of the State of California, and a resident of this judicial district.

17. Defendant Mark A. Kadzielski ("Mr. Kadzielski") is a principal of defendant Weissburg & Aronson Inc., and at all times herein mentioned was engaged in interstate commerce and was, an attorney at law, duly admitted and practicing law in the State of California. Mr. Kadzielski is a citizen of the State of California, and a resident of this judicial district, and has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

18. Defendant Weissburg & Aronson Inc. ("W&A") is engaged in interstate commerce and is a professional corporation engaged in the practice of law in the State of California and this judicial district, and has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

19. Defendant State of California, Board of Medical Quality Assurance ("BMQA") is an agency of the State of California created by and existing pursuant to Business and Professions Code, § 2000 et seq. Defendant BMQA is charged with the responsibility of enforcing, among others, Sections 805, 805.1 and 805.5 of the California Business and Profession Code as well as Section

423 et. seq. of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11133, et. seq.

20. Relief is sought against each and all defendants, as well as their agents, assistants, successors, employees, attorneys, representatives and all persons acting in concert or in cooperation with them or at their direction.

### FACTUAL ALLEGATIONS

21. From October, 1981 through the present, plaintiff Dr. Pinhas, a diplomat of the American Board of Ophthalmology, has been a member of the defendant Medical Staff. As such, he has had the right to cause the admission of his patients to defendant Midway Hospital and to use defendant Midway Hospital's facilities for the care and treatment of his patients, including, but not limited to, the facilities to perform eye surgery.

22. By reason of his training, experience and skill, Dr. Pinhas holds a national and international reputation as a specialist in corneal eye problems. He performs general eye surgery and specifically cornea transplants, cataract removal, and interocular lens replacements. Because of his training, experience and skill, Dr. Pinhas is able to perform these surgeries with a high level of success and with few, if any, complications. One of the reasons for his success is the rapidity with which he, as distinguished from his competitors, can perform such surgeries. The speed with which such surgery can be completed benefits the patient because the exposure of cut eye tissue is drastically reduced. Some of Dr. Pinhas' competitors regularly require, on the average, six times the length of surgical time to complete the same procedures as Dr. Pinhas. Because of his reputation, skill and successes Dr. Pinhas has performed more surgeries than any other



ophthalmic surgeon at Midway Hospital during the relevant time period.

23. Prior to February, 1986, the common practice in Los Angeles County was to have most eye surgeries, especially cataract extractions, performed by a primary surgeon and a second, assistant surgeon. This practice required by the defendant Medical Staff, the ("assistant surgeon requirement"), significantly increased the cost of such eye surgeries.

24. In February 1986, the administrators of Medicare, the federal health insurance program for the elderly, determined that assistant surgeons were not necessary in connection with the performance of such eye surgeries and refused, henceforth, to provide reimbursement for the charges of any such assistant.

25. Certain ophthalmic surgeons of staff at defendant Midway Hospital, including plaintiff Dr. Pinhas, requested that the defendant Medical Staff modify its assistant surgeon requirement. Nearly all hospitals in Southern California, except defendant Midway Hospital and Cedars-Sinai (whose Medical Staff overlaps with that of defendant Midway Hospital), abolished the assistant surgeon requirement at or about the time that Medicare made its change. The request to eliminate the assistant surgeon requirement at Midway Hospital was denied and remains in effect at the time of the filing of this First Amended Complaint.

26. The consequence of the failure to make the change was that surgeons, such as the plaintiff, would have to compensate their competitors to be their assistants during surgery since Medicare would no longer compensate such assistants. Plaintiff Dr. Pinhas advised the administration of Midway Hospital that the additional costs to

him of the Medical Staff's refusal to eliminate the assistant surgeon requirement would be about \$60,000 per year. Dr. Pinhas, expressing a desire to keep the bulk of his practice at defendant Midway Hospital, nonetheless stated that he would move his practice if the assistant surgeon requirement was not abolished.

27. On or about January 26, 1987 defendants Summit Health and Midway Hospital, seeking to resolve the difficulty created by defendant Medical Staff's refusal to abolish the assistant surgeon requirement and Medicare's refusal to reimburse for assistant surgeons. Defendant Summit Health and Midway Hospital offered a "sham" contract to Dr. Pinhas, a true and correct copy of this "sham" contract is attached hereto and made a part hereof as Exhibit "A". The scheme provided by this "sham" contract was to "hire" Dr. Pinhas for \$36,000 per year (later raised orally to \$60,000 per year) to perform certain services, except, Dr. Pinhas would never be called upon to do such work. The "sham" contract was a vehicle by which defendants Summit Health and Midway Hospital would pay Dr. Pinhas for continuing to bring patients to Midway Hospital. When the "sham" contract was explained to Dr. Pinhas, he was told that many of the members of the defendant Medical Staff had similar contracts, and that the Chief of the defendant Medical Staff, defendant Dr. Lurvey, was aware of this proposed contract and the other "sham" contracts.

28. Dr. Pinhas refused to in anyway participate in such a scheme, refused to sign the contract, and refused to return the contract, even after defendant Dr. Lurvey, acting on behalf of himself, defendant Summit Health, defendant Mr. Feldman, defendant Midway Hospital and defendant Medical Staff threatened that plaintiff's failure to do so would cause a review of his charts and possible



Peer Review Proceedings. Nevertheless, defendants Summit Health and Midway Hospital made one monthly payment of \$5000 to Dr. Pinhas. This payment was "hidden" in a reimbursement check to Dr. Pinhas and was promptly recorded by Dr. Pinhas as an overpayment and a credit against the amount of defendants Midway Hospital and Summit Health otherwise owed Dr. Pinhas.

29. By letter dated April 13, 1987 ("April 13, 1987 letter"), and without prior notice or an opportunity for a hearing, Dr. Pinhas was advised by defendants Summit Health and Midway Hospital, through defendants Dr. Lurvey and Mr. Feldman, that he was summarily suspended as of that immediate date. As such, Dr. Pinhas was deprived of all medical staff privileges, including the right to admit his patients and to perform surgical procedures. The April 13, 1987 letter stated that such action was the result of a "medical staff review of Dr. Pinhas' medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." (A true and correct copy of the April 13, 1987 letter is attached hereto as Exhibit "B" and made a part hereof.)

30. By the same April 13, 1987 letter, Dr. Pinhas was advised that the Midway Hospital Medical Executive Committee ("Midway Executive Committee") would convene to review and consider the action within 10 days.

31. On April 20, 1987 the Midway Executive Committee met. After an initial meeting from which Dr. Pinhas was excluded, the Executive Committee invited him into the meeting room and requested that Dr. Pinhas make a statement. Lacking sufficient notice, unprepared, confused and without benefit of legal or fellow staff advice, he

asked what the charges were, and was told that the letter of April 13, 1987 was self-explanatory. Thereafter, Dr. Pinhas attempted to reply briefly.

32. By letter dated April 20, 1987, the same date of that meeting, defendants Midway Hospital and Summit Health notified Dr. Pinhas that the Midway Executive Committee had upheld the summary suspension with the recommendation to terminate his staff privileges at Midway Hospital. He was also informed that the Midway Hospital Board of Directors had concurred with the Midway Executive Committee's recommendation. (A true and correct copy of the April 20, 1987 letter is attached hereto as Exhibit "C" and made a part hereof.)

33. In accordance with the Midway Hospital Medical Staff Bylaws ("Bylaws", a true and correct copy of the relevant portions of which are attached hereto as Exhibit "D" and made a part hereof), Dr. Pinhas requested a hearing by the Midway Hospital Judicial Review Committee ("Judicial Review Committee") by letter dated April 30, 1987. (A true and correct copy of the April 30, 1987 letter is attached hereto as Exhibit "E" and made a part hereof.)

34. In his April 30, 1987 letter, Dr. Pinhas made certain procedural and discovery requests, including the right to be represented by retained counsel, the right to full disclosure with sufficient particularity of all charges against him, the right to an impartial hearing officer, and the right to an unbiased, unprejudiced hearing panel.

35. On May 7, 1987 Dr. Pinhas received Midway Hospital's Notice of Hearing ("May 7, 1987 Notice") from defendants Midway Hospital and Summit Health, through defendant Mr. Feldman, scheduling the Judicial Review Committee's proceedings to commence on May 12,

1987. (A true and correct copy of the May 7, 1987 Notice is attached hereto as Exhibit "F" and made a part hereof.)

36. The May 7, 1987 Notice, according to the Bylaws, is also meant to serve the function of notifying a Respondent before the Judicial Review Committee of the charges that are being made against him. Those charges as contained in the May 7, 1987 Notice were rendered in broad, general terms. The Notice listed "specific charts" that the Hospital contended would support those charges. But the charts identified were not made available to Respondent as of the date of May 7, 1987 Notice. Approximately 128 charts were identified, though some appeared to be duplicates.

37. The May 7, 1987 Notice announced the appointment, by defendant Dr. Lurvey, of the members of the Judicial Review Committee and the appointment of the Hearing Officer, defendant Mr. Posell. All of the physicians who are included as members of the Judicial Review Committee are dependent upon the defendants Midway Hospital and Summit Health for their economic livelihood and professional activities. The members of the Judicial Review Committee, members of the defendant Medical Staff, together with defendants Summit Health, Midway Hospital, Dr. Lurvey, Mr. Feldman and Mr. Posell are represented by the same counsel, defendant W&A. W&A has represented the other defendants in connection with the preparation of the false and unjustified charges brought against plaintiff Dr. Pinhas.

38. The Judicial Review Committee, over the objection of Dr. Pinhas, included physicians who were and are in direct economic and professional competition with plaintiff Dr. Pinhas: John Hofbauer, M.D. and Stephen Seiff, M.D.

39. The May 7, 1987 Notice, in a summary fashion dismissed some of Dr. Pinhas' procedural and discovery requests, and stated that the Judicial Review Committee had unanimously voted not to permit Dr. Pinhas to be represented by an attorney at law at the hearing.

40. On May 9, 1987, Dr. Pinhas filed his Objections to the Notice of Hearing ("Objections"). (A true and correct copy of Dr. Pinhas' Objections is attached hereto as Exhibit "G" and made a part hereof.)

41. In his Objections, Dr. Pinhas contended that the May 7, 1987 Notice did not provide a reasonable quantum of time in which he could prepare, present, and have decided the preliminary Motions that he believed had to be resolved — with respect to procedure and substance — prior to the hearing of his matter. Moreover, Dr. Pinhas argued that without more specific information, and without possession and sufficient review and analysis of documentary evidence, the Judicial Review Committee hearing, as established and scheduled, contravened his rights under the United States and California Constitutions, the laws of the State of California, and the contractual obligations imposed upon defendant Midway Hospital and the defendant Medical Staff to fair notice and a rational and meaningful opportunity to be heard.

42. In his Objections, Dr. Pinhas requested that the Judicial Review Committee sustain those objections and dismiss the Notice of Hearing as totally defective.

43. On May 12, 1987, the administration of defendants Midway Hospital and Summit Health did not act upon the objection, but treated it as a request for a continuance and granted Dr. Pinhas a two week continuance, rescheduling the Judicial Review Committee hearing for May 26 and 27, 1987.



44. Because the May 7, 1987 Notice of Hearing named defendant Mr. Posell as the Hearing Officer, on May 8, 1987, Dr. Pinhas, through his counsel Lawrence Silver, sent Mr. Posell a letter requesting that he respond to certain questions in order that Dr. Pinhas could determine whether to file a challenge to Mr. Posell sitting as the Hearing Officer. (A true and correct copy of the May 8, 1987 letter is attached hereto as Exhibit "H" and made a part hereof.)

45. By letter ("Posell letter") dated May 11, 1987, Mr. Posell refused to respond to Dr. Pinhas' request. (A true and correct copy of the Posell letter is attached hereto as Exhibit "I" and made a part hereof.)

46. On May 14, 1987, Dr. Pinhas, through his counsel, filed 15 Motions with respect to procedural and discovery issues, including Motions regarding his request for representation by counsel and his request that Mr. Posell respond to certain voir dire questions in order to ascertain any bias, prejudice, or interest on Mr. Posell's part. (True and correct copies of these Motions are attached hereto as Exhibit "J" and made a part hereof.)

47. On information, knowledge and belief, plaintiff alleges that defendant Mr. Posell is biased and prejudiced against he and his counsel, Lawrence Silver, and that Mr. Posell and members of the law firm of which he is a partner, Shapiro, Posell & Close, serve as hearing officers at the request of defendant W&A in cases where W&A represents the hospital. There is a unity of interest between defendants W&A and Mr. Posell. Mr. Posell and his law firm are retained and continue to be retained as counsel to the Hospital because Mr. Posell ensures that Judicial Review Committees achieve the results that W&A and the clients of W&A desire. Mr. Posell and Shapiro, Posell & Close have an economic interest in the

outcome of the Peer Review Proceeding and had such an economic interest at the outset because his continued employment by defendant Summit Health, defendant Midway Hospital, defendant W&A and the defendant Kadzielski depends upon his continued rulings in favor of the defendant Midway Hospital's position and against physicians who are in the same position as Dr. Pinhas.

48. On May 18, 1987, Mr. Posell wrote to Dr. Pinhas' counsel and reiterated that the May 7, 1987 Notice advised Dr. Pinhas that the Judicial Review Committee had unanimously voted not to permit either Dr. Pinhas or the Medical Staff to be represented by an attorney at law at the hearing. Mr. Posell further stated that neither the Hearing Officer nor the Judicial Review Committee may consider Motions or requests made "in any phase of the hearing or appeal procedure by an attorney at law unless the Hearing Committee, in its discretion, permits both sides to be represented by legal counsel." Mr. Posell cited Bylaw Article VIII, Section 2(b), stating further that Dr. Pinhas' counsel's continued participation was a violation of that Bylaw. (A true and correct copy of Mr. Posell's May 18, 1987 letter is attached hereto as Exhibit "K" and made a part hereof.)

49. On May 19, 1987, Dr. Pinhas' counsel asked defendant Mr. Posell to recuse himself because of bias and prejudice and to answer three questions related to his ex parte communications with counsel for the defendant Midway Hospital, and for clarification of his ruling. (A true and correct copy of the letter to Mr. Posell dated May 19, 1987 is attached hereto as Exhibit "L" and made a part hereof.) Mr. Posell has not responded to that letter.

50. On May 19, 1987, Dr. Pinhas, appearing in propria persona, refiled the same 15 Motions respecting procedu-



ral and discovery matters, specifically including: the request to be represented by counsel; the request that the Hearing Officer respond to the voir dire questions submitted to him; the request for the full disclosure with particularity of the charges against him; and the request that Dr. Pinhas' motions be heard and decided at a reasonable time prior to the commencement of the hearing.

51. On May 21, 1987, defendant Mr. Posell denied nearly all of the Motions filed by Dr. Pinhas. (A true and correct copy of the letter from Mr. Posell dated May 21, 1987 is attached hereto as Exhibit "M" and made a part hereof.)

52. The alleged peer review hearings concerning Dr. Pinhas commenced on May 26 and proceeded for a total of six hearing sessions which were concluded on June 12, 1987.

53. During the course of the hearings, defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Posell, Mr. Kadzielski, W&A, Dr. Perlman, Mr. Feldman, Dr. Lurvey and Ms. Farber, engaged in conduct to deprive plaintiff Dr. Pinhas of a fair hearing.

54. On information, knowledge and belief, plaintiff alleges that defendants Mr. Kadzielski and W&A, directly and indirectly, had improper ex parte communications with defendant Mr. Posell.

55. On information, knowledge and belief, plaintiff alleges that defendants Mr. Kadzielski and W&A, directly and indirectly, had improper ex parte communications with members of the Judicial Review Committee.

56. On information, knowledge and belief, plaintiff alleges that defendant Dr. Perlman had improper ex parte communications with members of the Judicial Review Committee.

57. On information, knowledge and belief, plaintiff alleges that defendants Dr. Lurvey, the Medical Staff, Summit Health, Midway Hospital had improper ex parte communications with members of the Judicial Review Committee.

58. On information, knowledge and belief, plaintiff alleges that defendant Mr. Posell had improper ex parte communications with members of the Judicial Review Committee.

59. Defendants Summit Health, Midway Hospital, Medical Staff and others sought to, and did in fact, intimidate witnesses Dr. Pinhas sought to call as witnesses in his defense of the case, including the threat of initiating Peer Review Proceedings against physicians who might testify on behalf of Dr. Pinhas.

60. Defendants Summit Health, Midway Hospital, Medical Staff, Ms. Farber and others sought to, and did in fact, intimidate witnesses Dr. Pinhas sought to call as witnesses in his defense of the case.

61. On June 1, 1987, at approximately 6:30 p.m., defendant Ms. Farber of Midway Hospital's Risk Management Section approached a table in the cafeteria where Marina Nino, Barbara Aviles, Rose Pierce and Suprani Watana, all of whom were employed by defendants Summit Health and Midway Hospital, were sitting while they were waiting to be called into the hearing regarding Dr. Pinhas' privileges. Ms. Farber said the following:

a. "I want to prepare you for what you are getting yourselves into."

b. "You don't have to do this."

c. "You can leave if you want to. You will not be persecuted or harassed if you leave."

d. "You are on your own, the hospital will not pay for your time."

e. "It is going to be like a court in there. There is a court stenographer. Everything you say will be taken down and under oath."

f. "You will each be called, one by one, you will not be allowed to go in as a group."

g. "You will be questioned in there by doctors, you will be cross-examined."

62. Shortly thereafter, Kay Deol, an administrator of defendant Midway Hospital and an employee of defendants Summit Health, Midway Hospital and Mr. Feldman, came over to the table and she and defendant Ms. Farber stayed around and hovered around the cafeteria for the rest of the evening. (True and correct copies of the declarations dated June 9, 1987 of Marina Nino and Barbara Aviles are attached hereto as Exhibit "N" and made a part hereof.)

63. Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Kadzielski, W&A, Mr. Posell, Mr. Feldman, and Dr. Lurvey, precluded plaintiff Dr. Pinhas from examining two important witnesses, Mr. Feldman, the person who signed the charges against Dr. Pinhas and Dr. Lurvey, Chief of Staff who allegedly authorized the charges against Dr. Pinhas. Said defendants refused to produce Mr. Feldman and Dr. Lurvey as witnesses for cross-examination even though,

a. Mr. Feldman signed the charges,

b. Dr. Lurvey was listed in Exhibit "F", the charges, as a witness who would appear at the hearing, and

c. Dr. Pinhas and his representative repeatedly requested that they appear at the hearing and testify truthfully. (A true and correct copy of Dr. Pinhas' request to Dr. Lurvey and Mr. Feldman to appear are attached hereto as Exhibit "O" and made a part hereof.)

64. It is custom and practice in California that during the peer review proceeding, even if the Judicial Review Committee does not permit counsel to be present at the hearing, counsel is permitted to be on the grounds of the hospital to confer with his client during appropriate breaks in the proceeding.

65. Defendant Mr. Posell issued an order ordering counsel for Dr. Pinhas, who had been listed as a witness, excluded from the Hospital grounds during any portion of the hearing, while permitting counsel for the Hospital, Mr. Kadzielski and/or associates of W&A, not only to utilize hospital facilities, but also to communicate with the prosecutor, defendant Dr. Perlman.

66. Defendant Mr. Posell acted not only as Hearing Officer but also as counsel for defendant Midway Hospital and the Medical Staff, and ruled and continued to rule, without legal or factual justification, adversely to Dr. Pinhas.

67. Defendant Mr. Posell, acting as counsel for the Medical Staff, refused to allow Dr. Pinhas to have counsel.

68. Defendant Mr. Posell made rulings during the course of the entire proceeding to frustrate and interfere with plaintiff Dr. Pinhas' ability to defend against the charges brought against him.

69. Defendant Mr. Posell ruled that Dr. Pinhas' counsel's correspondence would not be answered, and yet



complied with all requests of defendants Mr. Kadzielski and W&A.

70. Defendant Mr. Posell intentionally ordered witnesses not to testify to the fact that defendant Dr. Macy and defendant Dr. Salz, who testified adversely to Dr. Pinhas at the hearing, also engaged in the same similar conduct with which Dr. Pinhas was charged. Mr. Posell precluded them from being identified by witnesses who were prepared to identify Dr. Macy and Dr. Salz to establish what the "standard in the community" was. Defendant Mr. Posell declined to permit Dr. Pinhas and his physician representative to have breaks and time to confer. In addition, Mr. Posell issued time requirements which were inherently unfair, and substantially prejudiced Dr. Pinhas. Mr. Posell, on the other hand, always considered and granted whatever requests were made by the prosecutor defendant Dr. Perlman.

71. Defendant Mr. Posell precluded testimony and evidence from being presented by Dr. Pinhas, and made hostile verbal comments to Dr. Pinhas, his physician representative and witnesses who appeared on behalf of Dr. Pinhas on and off the record made before the Judicial Review Committees.

72. Defendant Mr. Kadzielski and W&A retained, as they have done in the past, the services of Lacey Shorthand Reporting Service ("Lacey Reporters"), over whom they seek to exercise and do exercise control by reason of the substantial business they place with Lacey Reporters. Dr. Pinhas needed a copy of the transcript in order to adequately examine witnesses and prepare cross-examination. Plaintiff Dr. Pinhas, through counsel, ordered a copy of the transcript from Lacey Reporters on an expedited basis. Notwithstanding the order, defendant Mr. Kadzielski and W&A ordered Lacey Reporters not to produce the

transcript. On the same day as defendant Mr. Kadzielski and W&A issued their instructions to Lacey Reporters, counsel for Dr. Pinhas inquired how the preparation of the transcript was coming and was advised that Lacey Reporters could not produce a transcript in any timely fashion by which Dr. Pinhas could be able to use it for successive hearings. Upon information, knowledge and belief, plaintiff alleges that Lacey Reporters did so at the request of defendants Mr. Kadzielski and W&A. A day or so later Lacey Reporters agreed to produce the transcript, but not before the date that its utility for cross-examination would have passed and at a page rate of \$12.00 per page.

73. Defendant Mr. Posell, after he heard from other defendants that plaintiff Dr. Pinhas, through counsel, was trying to secure a transcript, and while the hearing was pending, called Dr. Pinhas on the telephone. During that telephone conversation Mr. Posell called Dr. Pinhas a liar and threatened him by saying that Dr. Pinhas' attempts to get a copy of the transcript would cause him problems in the future.

74. On June 29, 1987 Dr. Pinhas received in the mail a document entitled "Report and Decision of the Judicial Review Committee ("Report and Decision") (a copy of the Report and Decision is attached hereto as Exhibit "P").

75. Upon information, knowledge and belief, plaintiff alleges that defendant Mr. Posell drafted the purported Report and Decision in an effort to protect defendants Summit Health, Midway Hospital, the Medical Staff, Dr. Lurvey, Mr. Feldman and himself from liability, and that such report was inconsistent with the findings and determinations of the Judicial Review Committee.



76. Although the alleged Report and Decision purports to bear the signature of the Chairman of the Judicial Review Committee, Ellis Berkowitz, M.D.; it does not. Plaintiff on information knowledge and belief alleges that this alleged Report and Decision is not reflective of the determination of that tribunal. Plaintiff on information knowledge and belief alleges that this alleged Report and Decision was signed by an agent of defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman and Dr. Lurvey, without the authorization of each member of the Judicial Review Committee.

77. On July 6, 1987 the defendant Medical Staff appealed the decision of the Judicial Review Committee to the Governing Board of defendant Midway Hospital (a copy of the appeal of Defendant Medical Staff is attached hereto and made a part hereof as Exhibit "Q").

78. On July 7, 1987 Plaintiff Dr. Pinhas appealed the purported decision of the Judicial Review Committee to the Governing Board of the Defendant Midway Hospital (a copy of the appeal of plaintiff Dr. Pinhas is attached hereto as Exhibit "R").

#### FIRST CLAIM FOR RELIEF

(For Declaratory Relief Against Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Lurvey and BMQA Because They are Violating the Constitution of the United States by Enforcing and Participating in the Enforcement of Section 805 and 805.5 of the California Business and Professions Code and Section 423, et seq of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11133)

79. Plaintiff incorporates Paragraphs 1 through 78, inclusive, above by reference as though set forth in full herein.

80. Defendants, and each of them, are estopped from denying, that the actions which the defendants have taken, and the actions which are threatened by the defendants, have been done and are being done pursuant to and under authority of the laws of the State of California and the laws of the United States.

81. Defendants, and each of them, are estopped from denying that they have acted, claim to act, and threaten to continue to act, pursuant to, under the authority of, and within the protection of:

a. Section 70703, et seq., of the California Administrative Code;

b. Section 805 of the California Business and Professions Code;

c. Section 805.5 of the California Business and Professions Code;

d. Section 805.1 of the California Business and Professions Code;

e. Section 1094.5 of the California Code of Civil Procedure and the case law decided thereunder;

f. Sections 1156 and 1157 of the California Evidence Code;

g. Section 43.7 of the California Civil Code;

h. Other provisions of the laws of the State of California and the case law decided thereunder; and

i. Sections 423 et seq. of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11133, et. seq.

82. To maintain licenses, health care facilities regularly must review privilege termination and restriction procedures to assure their conformity to applicable law. The California Administrative Code § 70703(a) requires that the Hospital "shall have an organized medical staff responsible to the governing body for the adequacy and quality of the medical care rendered to patients in the hospital." According to Title 22, California Administrative Code, § 70701(a)(1)(F), a Hospital must have a governing body which must adopt written bylaws, in accordance with legal requirements and its community, which shall include "self-government by the medical staff with respect to the professional work performed in the hospital . . . ." The governing body shall "assure that the medical staff bylaws, rules and regulations are subject to governing body approval . . . , and these bylaws shall include an effective formal means for the medical staff, as a liaison, to participate in the development of all hospital policy." *Id.* at (8), (9).

83. When a health care facility terminates or restricts the privileges of a physician, it must promptly report to the defendant BMQA all facts and circumstances that caused the termination or restraint pursuant to Section 805 of the California Business and Professions Code, which reads as follows:

*"California Business and Professions Code §805*

The chief executive officer and the chief of the medical staff, where one exists, of any health facility licensed pursuant to Division 2 (commencing with Section 1200), or any medical, psychological, dental or podiatric professional society, or medical specialty society described in Section 43.7 of the Civil Code, or any health care service plan or medical care foundation shall report to the agency which issued the

license, certificate or similar authority when any licensed physician and surgeon, psychologist, podiatrist, or dentist is denied staff privileges, removed from the medical staff of the institution or if his or her staff or membership privileges are restricted for a cumulative total of 45 days in any calendar year for any medical disciplinary cause or reason. The reports shall be made within 20 working days following such removal or restriction, shall be certified as true and correct by the chief executive officer and the chief of the medical staff, where one exists, and shall contain a statement detailing the nature of the action, its date and all of the reasons for, and circumstances surrounding, the action. If the removal or restrictions is by resignation or other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state.

The reporting required herein shall not act as a waiver of confidentiality of medical records and committee reports. The information reported or disclosed shall be kept confidential except as provided in subdivision (c) of Section 800, provided that a copy of the report containing the information required by this section may be disclosed as required by Section 805.5 with respect to reports received on or after January 1, 1976. The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, and the Board of Dental Examiners shall disclose such reports as required by Section 805.5. A file containing reports received pursuant to this section shall be maintained by the agency receiving the reports for a minimum of five years after receipt.



No person shall incur any civil or criminal liability as the result of making any report required by this section.

Failure to make a report pursuant to this section shall be a misdemeanor punishable by a fine of not less than two hundred dollars (\$200) nor more than one thousand two hundred dollars (\$1,200)."

84. Pursuant to Section 805.5 of the California Business and Professions Code, hospitals are required to request from BMQA information regarding any adverse determination made pursuant to the peer review process contained in BMQA's records. The pertinent parts of Section 805.5 of the California Business and Professions Codes read as follows:

*"California Business and Professions Code § 805.5*

(a) Prior to granting or renewing staff privileges for any physician and surgeon, clinical psychologist, podiatrist, or dentist, any health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, or any health care service plan or medical care foundation, or the medical staff of any such institution, shall request a report from The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, or the Board of Dental Examiners to determine if any report has been made pursuant to Section 805 indicating that the applying physician and surgeon, clinical psychologist, podiatrist, or dentist has been denied staff privileges, been removed from a medical staff, or had his staff privileges restricted as provided in Section 805. The request shall include the name and California license number of the physician and surgeon, clinical psychologist, podiatrist, or den-

tist. Furnishing of a copy of the 805 report shall not cause the 805 report to be a public record.

(b) Upon a request made by an institution described in subdivision (a) or its medical staff, which is received on or after January 1, 1980, the board shall furnish a copy of any report made pursuant to Section 805. However, the board shall not send a copy of a report where the denial, removal, or restriction was imposed solely because of the failure to complete medical records.

In the event that the board fails to advise such institution within 30 working days following its request for a report required by this section, the institution may grant or renew staff privileges for the physician and surgeon, clinical psychologist, podiatrist, or dentist.

(c) Any institution described in subdivision (a) or its medical staff which violates the provisions of subdivision (a) is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars (\$200) nor more than one thousand two hundred dollars (\$1,200)."

85. California Business and Professions Code § 850.1 provides that the state licensing agency, defendant BMQA, is entitled to inspect and copy statements of charges, documents, medical charts or exhibits in evidence; and any opinion findings or conclusions relating to any disciplinary proceeding resulting in an action subject to § 805 of the Business and Professions Code reporting provisions.

86. A hospital's decision terminating and restricting privileges are judicially reviewable pursuant to Section 1094.5 of the California Code of Civil Procedure. (A copy



of the text of Section 1094.5 is attached hereto as Addendum "A".)

87. Peer review proceedings are confidential pursuant to California Evidence Code Sections 1156 and 1157. (A copy of the text of Sections 1156 and 1157 are attached hereto as Addendum "B".)

88. California provides immunity to participants in the peer review process pursuant to Section 43.7 of the California Civil Code. (A copy of the text of Section 43.7 is attached hereto as Addendum "C".)

89. Defendants are estopped from denying that they have been, are presently, and will be acting under color of authority of law and the protection afforded to them provided by the laws of the State of California and of the United States. All defendants are engaged in the enforcement and execution of the laws of the State of California, and more particularly, an alleged peer review process directed to plaintiff at defendant Midway Hospital. As a result of defendants' wrongful conduct, plaintiff has been deprived of his constitutionally protected rights.

90. Defendant BMQA is the "Board of Medical Examiners" as defined by the Health Care Quality Improvement Act of 1986, Section 423, et. seq. § 11133 which provides, in pertinent part:

"Sec. 423. REPORTING OF CERTAIN PROFESSIONAL REVIEW ACTIONS TAKEN BY HEALTH CARE ENTITIES[, 42 U.S.C. § 11133].

(a) REPORTING BY HEALTH CARE ENTITIES. —

(1) ON PHYSICIANS. — Each health care entity which —

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

\* \* \*

(3) INFORMATION TO BE REPORTED. — The information to be reported under this subsection is —

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) REPORTING BY BOARD OF MEDICAL EXAMINERS. — Each Board of Medical Examiners shall report, in accordance with section 424, the information reported to it under subsection (a) and known instances of a health care entity's failure to report information under subsection (a)(1).

\* \* \*

Sec. 425. DUTY OF HOSPITALS TO OBTAIN INFORMATION, [42 U.S.C. § 11135].

(a) IN GENERAL. — It is the duty of each hospital to request from the Secretary (or the agency designated under section 424(b)), on and after the date information is first required to be reported under section 424(a)) —

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical privileges at, the hospital, information reported under this part concerning the physician or practitioner, and

(2) once every 2 years information reported under this part concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital.

A hospital may request such information at other times. Sec. 427. MISCELLANEOUS PROVISIONS[, 42 U.S.C. § 11137].

(a) PROVIDING LICENSING BOARDS AND OTHER HEALTH CARE ENTITIES WITH ACCESS TO INFORMATION. — The Secretary (or the agency designated under section 424(b)) shall, upon request, provide information reported under this part with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner or to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

\* \* \*

(c) RELIEF FROM LIABILITY FOR REPORTING. — No person or entity shall be held liable in any civil action with respect to any report

made under this part without knowledge of the falsity of the information contained in the report.

(d) INTERPRETATION OF INFORMATION.

— In interpreting information reported under this part, a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred."

91. Defendant BMQA is charged with the enforcement of the Health Care Quality Improvement Act of 1986, see Section 423, et. seq.

92. Defendant BMQA asserts that the following is required pursuant to Sections 805 of the California Business and Professions Code and pursuant to Section 423 of the Health Care Quality Improvements Act of 1986:

a. Defendant Midway Hospital, by its administrator, and defendant Dr. Lurvey, as Chief of Staff of Midway Hospital, are required pursuant to Section 805 of the California Business and Professions Code to submit a "Section 805 report" to it.

b. Defendant Midway Hospital is required, pursuant to Section 423 of the Health Care Quality Improvements Act of 1986, to make a "Section 423 report" to it.

c. Absent notice and an opportunity for hearing, the Section 805 report, or the contents thereof, shall, pursuant to Business and Professions Code Section 805.5, be distributed to (a) all health care facilities where plaintiff Dr. Pinhas has staff privileges, upon reappointment to the staff, and (b) all hospitals where Dr. Pinhas may apply for staff privileges.



d. Absent notice and an opportunity for hearing, the Section 423 report, or the contents thereof, shall, pursuant to Section 423 of the Health Care Quality Improvements Act of 1986, be distributed, within two years, to (a) all health care facilities where plaintiff Dr. Pinhas has staff privileges, upon reappointment to the staff, and (b) all hospitals where Dr. Pinhas may apply for staff privileges.

93. Defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman and Dr. Lurvey have threatened to file and continue to threaten to file a Section 805 report and a Section 423 report.

94. Defendant Midway Hospital's chief executive officer and defendant Dr. Lurvey may claim immunity of the content of the filing of a Section 805 report even if that content is incorrect, misleading or malicious pursuant to Section 805 of the Business and Professions Code.

95. Defendant Midway Hospital and defendant Dr. Lurvey may claim immunity of the content of the filing of a Section 423 report even if that content is incorrect, misleading or malicious pursuant to Section 427 of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11137(c).

96. Dr. Pinhas has no control over the wording that is contained in the Section 805 report or Section 423 report from defendant Midway Hospital and defendant Dr. Lurvey.

97. The Section 805 report and the Section 423 report was, or will be, prepared and the wording was selected within the complete discretion of defendant Midway Hospital and defendant Dr. Lurvey.

98. Defendant Midway Hospital and defendant Dr. Lurvey are not required to submit, in advance, and do not

intend to submit, in advance of their filing it with BMQA, the form of Section 805 report or Section 423 report to Dr. Pinhas.

99. Defendant Midway Hospital and defendant Dr. Lurvey are not required to provide Dr. Pinhas, and will not provide Dr. Pinhas, with a copy of the Section 805 report or the Section 423 report after it has been filed with BMQA.

100. The Section 805 report and the Section 423 report or the content thereof shall be distributed to other hospitals, physicians and others pursuant to the statute, regardless of the content of the reports.

101. Any receipt of the Section 805 report or Section 423 report, the maintenance of the Section 805 report or the Section 423 report, or the distribution of the Section 805 report or the Section 423 report, is done with the funds of the State of California, is done pursuant to the authority provided by the statutes of the State of California, more particularly, the California Business and Professions Code Sections 805 and 805.5 and the Health Care Quality Improvements Act of 1986. The obligation of hospitals, to secure information contained in the Section 805 report or Section 423 reports for physicians whose staff privileges are being renewed or who seek staff privileges, is compelled and criminal sanctions may apply to those who do not, pursuant to the laws of the State of California, more particularly the California Business and Professions Code Sections 805 and 805.5 and the Health Care Quality Improvements Act of 1986.

102. It is common practice in California, for every hospital who seeks appointment or reappointment of a physician to the medical staff, to require that the physician disclose whether or not they have had medical staff



privileges suspended, terminated, or any action taken thereon.

103. It is common practice in California for hospitals, after the decision in *Elam v. College Park Hospital*, 132 Cal.App.3d 332, 183 Cal.Rptr. 156 (1982) to preclude admission to the hospital staff if a physician has a report that in any way casts any doubt on his competency to practice medicine or engages in any conduct which may adversely affect patient care.

104. Plaintiff Pinhas contends and seeks the declaration of this Court that § 805 and § 805.5 of the Business and Professions Code of the State of California as interpreted and implemented by the acts of the defendants, including defendant BMQA, violates the Constitution of the United States and more particularly the 14th and 5th Amendments thereto in that Dr. Pinhas' rights to due process of law, the equal protection of the laws and his rights to privacy secured to him by the Constitution of the United States are violated.

105. Defendants contend and seek a declaration to the contrary.

106. Plaintiff Pinhas contends and seeks a declaration of this Court that Section 423 et. seq. of the Health Care Quality Improvements Act of 1986 violates the Constitution of the United States and more particularly the 5th Amendment thereto in that Dr. Pinhas' rights to due process of law, the equal protection of the laws and his rights to privacy secured to him by the Constitution of the United States are violated.

107. Defendants contend and seek a declaration to the contrary.

108. It is necessary and appropriate that this dispute between plaintiff Dr. Pinhas and defendants be adjudi-

cated and determined promptly, so that the parties to this litigation may know their rights and obligations under the laws and Constitution of the United States and because failure to determine this dispute will result in irreparable injury to Dr. Pinhas.

## SECOND CLAIM FOR RELIEF

(For Damages for Violations of Plaintiff's Constitutional Rights and the Civil Rights Act, 42 U.S.C. § 1983 by Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Mr. Posell, Dr. Macy, Dr. Salz, Dr. Perlman, Ms. Farber, Mr. Kadzielski, W&A, and Each of Them)

109. Plaintiff incorporates Paragraphs 1 through 78 and 80 through 103, inclusive, above by reference as though set forth in full herein.

110. Dr. Pinhas has been summarily, knowingly, and intentionally deprived of the status and his property interest in membership on Midway Hospital's medical staff, including admitting and surgical privileges at Midway Hospital, without prior notice or an opportunity to be heard.

111. By virtue of the unjustified and unlawful Peer Review Proceeding which has been commenced and is continuing to be prosecuted against Dr. Pinhas, defendants and each of them have been, are presently, and will be acting under the color of authority and law of the State of California and of the United States. Defendants and each of them claim that they are engaged in the enforcement and execution of the laws of the State of California and the peer review process. Under such circumstances, Dr. Pinhas is entitled to due process rights under the United States Constitution.

112. Defendants, and each of them, by denying Dr. Pinhas representation by counsel, full disclosure with particularity of the charges against Dr. Pinhas and by refusing to take action on plaintiff's request that Dr. Pinhas' Motions be heard and decided at a reasonable time prior to the commencement of the hearing, are acting in contravention of procedures required by due process. Further, defendants and each of them, by denying plaintiff his right to an unbiased, unprejudiced, detached hearing officer, and by appointing the Judicial Review Committee that consists of members who are in active economic and professional competition with plaintiff and of defendant's own medical staff and subject to the control, persuasion and undue influence of defendants, is further depriving defendant of a fair opportunity to be heard as guaranteed to him by the due process and equal protection clauses of the Constitution of the United States. Further, improper ex parte communications between counsel for the Medical Staff, the hearing officer, the Judicial Review Committee members, the prosecutor, and officers of the Hospital deny plaintiff a fair hearing consistent with due process. Further, defendants' intimidation of witnesses, depriving witnesses of the plaintiff from attending the hearing, threatening plaintiff's counsel with arrest and ordering him off Hospital grounds during the hearing — even though he was listed as a witness, ordering witnesses not to testify to facts helpful to plaintiff Dr. Pinhas, vilifying plaintiff, his physician representative, his witnesses, and interfering with plaintiff's ability to timely get a copy of the transcript of proceedings deprive plaintiff of due process of law.

113. Based on the conduct of defendants, and each of them, as set forth above, Dr. Pinhas has been deprived of his rights in violation of the 5th and the 14th Amendments and Due Process and Equal Protection Clauses of

the United States Constitution together with his constitutional right to privacy and has been and will continue to suffer damages in an amount to be determined at the trial of this matter, but in excess of the jurisdictional limits of this Court.

114. As a result of the conduct of defendants and each of them, plaintiff is entitled to reasonable attorneys fees, pursuant to 42 U.S.C. § 1988.

### THIRD CLAIM FOR RELIEF

(For Damages for Violations of the Constitution of the United States and the Civil Rights Act 42 U.S.C. § 1985(3) by Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Mr. Posell, Dr. Macy, Dr. Salz, Dr. Perlman, Ms. Farber, Mr. Kadzielski, W&A, and Each of Them)

115. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 78, 80 through 103 and 110 inclusive, of this First Amended Complaint.

116. Defendants, and each of them, have conspired to deprive plaintiff of equal protection under the laws and of equal privileges and immunities under the laws. In furtherance of this conspiracy, defendants, and each of them, have denied Dr. Pinhas representation by counsel, full disclosure with particularity of the charges against Dr. Pinhas and denied plaintiff's request that Dr. Pinhas' Motions be heard and decided at a reasonable time prior to the commencement of the hearing, and have acted in contravention of procedures required by due process. Further, defendants and each of them, have denied plaintiff his right to an unbiased, unprejudiced, detached hearing officer, and by appointing the Judicial Review Committee that consists of members who are in active



economic and professional competition with plaintiff and of defendant's own medical staff and subject to the control, persuasion and undue influence of defendants, has further deprived defendant of a fair opportunity to be heard as guaranteed to him by the due process and equal protection clauses of the Constitution of the United States. Further, improper ex parte communications between counsel for the Medical Staff, the hearing officer, the Judicial Review Committee members, the prosecutor, and officers of the Hospital have denied plaintiff a fair hearing consistent with due process. Further, defendants' intimidation of witnesses, depriving witnesses of the plaintiff from attending the hearing, threatening plaintiff's counsel with arrest and ordering him off Hospital grounds during the hearing — even though he was listed as a witness, ordering witnesses not to testify to facts helpful to plaintiff Dr. Pinhas, vilifying plaintiff, his physician representative, his witnesses on and off the record before the Judicial Review Committee, and interfering with plaintiff's ability to timely get a copy of the transcript of proceedings has deprived plaintiff of due process of law.

117. As a result of the conduct of defendants, and each of them, plaintiff has suffered property damage to his medical practice, and has suffered the deprivation of his property interest in membership on the Midway Hospital's medical staff, including admitting and surgical privileges, at Midway Hospital. As a consequence, plaintiff has been deprived of his rights in violation of the 5th and 14th Amendments and Due Process and Equal Protections Clauses of the United States Constitution together with the constitutionally protected right of privacy.

118. As a result of the conduct of defendants, and each of them, plaintiff has been damaged in an amount to be determined at the time of trial, but in an amount in excess of the jurisdictional limits of this Court.

119. As a result of the conduct of defendants, and each of them, plaintiff is entitled to reasonable attorneys fees, pursuant to 42 U.S.C. § 1988 of the Civil Rights Act.

#### FOURTH CLAIM FOR RELIEF

(Treble Damages for Violation of the Sherman Anti-Trust Act, Section 1, 15 U.S.C. § 1 by defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, Dr. Perlman, Mr. Kadzielski, W&A and Each of Them)

120. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 78, 80, 84, 90, 91, 93 through 103, and 112, inclusive, of the First Amended Complaint.

121. Defendants Dr. Reader, Dr. Macy, Dr. Salz, Dr. Perlman, and others are engaged in the practice of medicine limited to eye medicine and ophthalmologic surgery and are in competition with plaintiff Dr. Pinhas.

122. Defendants are seeking to effectuate a boycott and drive Dr. Pinhas out of business so that other ophthalmologists and eye physicians, including, but not limited to, defendants Dr. Reader, Dr. Macy, Dr. Salz and Dr. Perlman, will have a greater share of the eye care and ophthalmic surgery in Los Angeles.

123. In an effort to effectuate the boycott and to boycott plaintiff Dr. Pinhas, defendants Dr. Reader, Dr. Macy, Dr. Salz, Dr. Perlman, and others, including, but not limited to, Dr. Lurvey have sought to control and do control defendant Medical Staff. Defendant Mr. Feldman



controls Summit Health insofar as it relates to Dr. Pinhas and Midway Hospital.

124. After Dr. Pinhas refused to accept the terms and conditions of the "sham" contract and refused to return a copy of it to Midway Hospital, and after defendant Dr. Lurvey threatened that proceedings may be instituted against him in the event that he sought to utilize this Exhibit "A" in any way detrimental to Midway Hospital, in late March, 1987 Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Perlman entered into a combination and conspiracy to retaliate against Dr. Pinhas and to preclude him from continued competition in the market place, not only at defendant Midway Hospital, but by reason of the filing of an improper Section 805 report and a Section 423 report, preclude plaintiff Pinhas from practicing medicine in California, if not the United States. In furtherance of the conspiracy of defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Pearlman, defendants enlisted the assistance and received the assistance of Mr. Posell, Mr. Kadzielski, and W&A to create unjustified charges, to secure adverse determinations against plaintiff Dr. Pinhas, to cause a summary suspension and termination of his privileges at Midway Hospital and report that summary suspension and termination to the defendant BMQA, and causing dissemination of that adverse determination to all hospitals which Dr. Pinhas is a member, and to all hospitals to which he may apply so as to secure similar actions by those hospitals, thus effectuating a boycott of Dr. Pinhas.

125. Without admission to other hospitals, plaintiff Pinhas has no method by which he can practice

ophthalmic surgery, which constitutes the greater portion of his practice.

126. The actions undertaken by defendants in connection with the bringing of false charges against Dr. Pinhas were done with oppression and malice and:

a. Were not done in a reasonable belief that the action was in furtherance of the quality of health care;

b. Were not done after a reasonable effort to obtain the facts of the matter;

c. Were not done after adequate notice and hearing procedures afforded to Dr. Pinhas, and utilized procedures which were not fair under the circumstances; and

d. Were not based upon the reasonable belief that the action was warranted by the facts after defendants' efforts to obtain facts.

#### FIFTH CLAIM FOR RELIEF

(Injunctive Relief Against All Defendants)

127. Plaintiff realleges and incorporates herein by reference all of the allegations of this First Amended Complaint.

128. Defendants, and each of them, threatened to, and unless restrained will, continue to deprive plaintiff Dr. Pinhas of his right to due process and fair procedure under both the United States Constitution and the Constitution of the State of California.

129. Defendants' conduct has caused, and will continue to cause, plaintiff great and irreparable injury, including, but not limited to, the injury which resulted in

the filing of a California Business and Professions Code Section 805.5 notice for which pecuniary damages would not afford adequate relief, in that they would not completely compensate plaintiff's professional reputation and good standing, and would be extremely difficult to ascertain.

WHEREFORE, plaintiff requests judgment to be entered for plaintiff and against defendants, and each of them, as follows:

1. On the First Claim for Relief, for a declaratory judgment that Sections 805 and 805.5 of the California Business and Professions Code and Section 423 et seq of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11133 et seq., are unconstitutional, together with costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

2. On the Second Claim for Relief, for damages according to proof, for costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

3. On the Third Claim for Relief, for damages according to proof, for costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

4. On the Fourth Claim for Relief, for damages according to proof and then trebled, and for costs of suit incurred herein, including reasonable attorneys fees as allowed by law, and for such other and further relief as the Court deems just and proper.

5. On all Claims for Relief an injunction, preliminary, and final, against each and all defendants, their agents, assistants, successors, employees, attorneys, representatives, and all persons acting in concert or cooperation with them or at their direction from violating the right of plaintiff.

### JURY TRIAL DEMAND

1. Plaintiff hereby demands trial by jury herein.

DATED: July 13, 1987

LAWRENCE SILVER  
A Law Corporation

By: LAWRENCE SILVER  
*Attorneys for Plaintiff*  
*Simon J. Pinhas, M.D.*



**CALIFORNIA CODE OF CIVIL PROCEDURE  
SECTION 1094.5**

“(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board, or officer may be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record shall be borne by the petitioner. Where the petitioner has proceeded pursuant to Section 68511.3 of the Government Code and the Rules of Court implementing that section and where the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript shall be borne by the respondent. Where the party seeking the writ has proceeded pursuant to \* \* \* Section 1088.5, the administrative record shall be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, where required, or as otherwise directed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has

**ADDENDUM “A”**

not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in case in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Notwithstanding \* \* \* subdivision (c), in cases arising from private hospital boards or boards of directors of districts organized pursuant to The Local Hospital District Law, Division 23 (commencing with Section 32000) of the Health and Safty Code, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record. However, in all cases in which the petition alleges discriminatory actions prohibited by Section 1316 of the Health and Safety Code, and the plaintiff makes a preliminary showing of substantial evidence in support of that allegation, the court shall exercise its independent judgment on the evidence and abuse of discretion shall be established if the court determines that the finding are not supported by the weight of the evidence.

(e) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) \* \* \* remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise



its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(g) Except as provided in subdivision (h), the court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, no such stay shall be imposed or continued in the court is satisfied that it is against the public interest; provided that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2. If an appeal is taken from a denial of the writ, the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or deci-

sion is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings.

(h)(1) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision of any licensed hospital or any state agency made after a hearing required by statute to be conducted under the provisions of the Administrative Procedure Act, as set forth in Chapter 5 (commencing with Section 115000) of Part 1 of Division 3 of Title 2 of the Government Code, conducted by the agency itself or an administrative law judge on the staff of the Office of Administrative Hearings pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing the notice, whichever occurs first. However, the stay shall not be imposed or continued unless the court is satisfied that the public interest will not suffer and that the licensed hospital or agency is unlikely to prevail ultimately on the merits; and provided further that the application for the stay shall be accompanied by proof of service of a copy of the application on the respondent. Service shall be made in the manner provided by Title 5 (commencing with Section 405) of Part 2 or Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(2) The standard set forth in this subdivision for obtaining a stay shall apply to any administrative order or decision of an agency which issued licenses pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code or pursuant to the Osteopathic

Initiative Act or the Chiropractic Initiative Act. With respect to orders or decisions of other state agencies, the standard in this subdivision shall apply only when the agency has adopted the proposed decision of the administrative law judge in its entirety or has adopted the proposed decision but reduced the proposed penalty pursuant to subdivision (b) of Section 11517 of the Government Code; otherwise the standard in subdivision (g) shall apply.

(3) If an appeal is taken from a denial of the writ, the order or decision of the hospital or agency shall not be stayed except upon the order to which the appeal is taken. However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the operation of law for a period of 20 days from the filing of the notice. If an appeal is taken from the granting of the writ, the order or decision of the hospital or agency is stayed pending the granting of the writ, the order or decision of the hospital or agency is stayed pending the determination of the appeal unless the court to which the appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect, the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of the proceedings."

## CALIFORNIA EVIDENCE CODE SECTIONS 1156 AND 1157

"§ 1156. (a) In-hospital medical or medical-dental staff committees of a licensed hospital may engage in research and medical or dental study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to such purpose. Except as provided in subdivision (b), the written records of interviews, reports, statements, or memoranda of such in-hospital medical or medical-dental staff committees relating to such medical or dental studies are subject to Sections 2016 to 2036, inclusive, of the Code of Civil Procedure (relating to discovery proceedings) but, subject to subdivisions (c) and (d), shall not be admitted as evidence in any action or before any administrative body, agency, or person.

(b) The disclosure, with or without the consent of the patient, of information concerning him to such in-hospital medical or medical-dental staff committee does not make unprivileged any information that would otherwise be privileged under Section 994 or 1014; but, notwithstanding Sections 994 and 1014, such information is subject to discovery under subdivision (a) except that the identity of any patient may not be discovered under subdivision (a) unless the patient consents to such disclosure.

(c) This section does not affect the admissibility in evidence of the original medical or dental records of any patient.

(d) This section does not exclude evidence which is relevant evidence in a criminal action."

## ADDENDUM "B"



§ 1157. Proceedings and records of medical, medical-dental, podiatric, registered dietitian, psychological or veterinary staff review committees; local medical, dental, dental hygienist, podiatric, dietetic, veterinary, chiropractic society, or state or local psychological review committees.

(a) Neither the proceedings nor the records or organized committees of medical, medical-dental, podiatric, registered dietitian, psychological or veterinary staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or registered dietitian review or veterinary review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, or chiropractic societies, or psychological review committees of state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.

(c) The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at \* \* \* a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(d) The prohibitions \* \* \* in this section do not apply to medical, dental, dental hygienist, podiatric, dietetic, psychological, veterinary or chiropractic society committees that exceed 10 percent of the membership of the society, nor to any of those committees if any person serves upon the committee when his or her own conduct of practice is being reviewed.

(e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, do not exclude the discovery or use of relevant evidence in a criminal action."

## CALIFORNIA CIVIL CODE SECTION 43.7

"(b) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any professional society, any member of a duly appointed committee of a medical specialty society, or any member of a duly appointed committee of a state or local professional society, or duly appointed member of a committee of a professional staff of a licensed hospital (provided the professional staff operates pursuant to written bylaws that have been approved by the governing board of the hospital), for any act or proceeding undertaken or performed within the scope of the functions of any such committee which is formed to maintain the professional standards of the society established by its bylaws, or any member of any peer review committee whose purpose is to review the quality of medical, dental, dietetic, chiropractic, optometric, or veterinary services rendered by physicians and surgeons, dentists, dental hygienists, podiatrists, registered dietitians, chiropractors, optometrists, veterinarians, or psychologists which committee is composed chiefly of physicians and surgeons, dentists, dental hygienists, podiatrists, registered dietitians, chiropractors, optometrists, veterinarians, or psychologists for any act or proceeding undertaken or performed in reviewing the quality of medical, dental, dietetic, chiropractic, optometric, or veterinary services rendered by physicians and surgeons, dentists, dental hygienists, podiatrists, registered dietitians, chiropractors, optometrists, veterinarians, or psychologists or any member of the governing board of a hospital in reviewing the quality of medical services rendered by members of the staff if such professional society, committee, or board member acts without malice, has made a reasonable effort to obtain the facts of

## ADDENDUM "C"

the matter as to which he, she, or it acts, and acts in reasonable belief that the action taken by him, her, or it is warranted by the facts known to him, her, or it after such reasonable effort to obtain facts. 'Professional society' includes legal, medical, psychological, dental, dental hygiene, dietetic, accounting, optometric, podiatric, pharmaceutical, chiropractic, physical therapist, veterinary, licensed marriage, family, and child counseling, licensed clinical social work, and engineering organizations having as members at least a majority of the eligible persons or licentiates in the geographic area served by the particular society.

'Medical specialty society' means an organization having as members at least 25% of the eligible physicians within a given professionally recognized medical specialty in the geographic area served by the particular society.

• •

(d) There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any physician and surgeon, podiatrist, chiropractor, or attorney who is a member of an underwriting committee of an interindemnity or reciprocal or interinsurance exchange or mutual company for any act or proceeding undertaken or performed in evaluating physicians and surgeons, podiatrists, chiropractors, or attorneys for the writing of professional liability insurance, or any act or proceeding undertaken or performed in evaluating physicians and surgeons or attorneys for the writing of an interindemnity, reciprocal, or interinsurance contract as specified in Section 1280.7 of the Insurance Code, if the evaluating physician and surgeon, podiatrist, chiropractor, or attorney acts without malice, has made a reasonable effort to obtain the facts of the matter as to which he



or she acts, and acts in reasonable belief that the action taken by him or her is warranted by the facts known to him or her after reasonable effort to obtain the facts.

(e) This section shall not be construed to confer immunity from liability on any quality assurance committee established in compliance with Section 4070 and 5624 of the Welfare and Institutions Code or hospital. In any case in which, but for the enactment of the preceding provisions of this section, a cause of action would arise against a quality assurance committee established in compliance with Sections 4070 and 5624 of the Welfare and Institutions Code or hospital, such cause of action shall exist as if the preceding provisions of this section had not been enacted."

[SUMMIT HEALTH LTD. LETTERHEAD  
DELETED]

CONFIDENTIAL

January 26, 1987

Simon Pinhas, M.D.  
9033 Wilshire Boulevard, Suite 206  
Beverly Hills, CA 90211

Dear Dr. Pinhas:

It is our pleasure to submit this letter to you as a result of our negotiations, representing the understanding and agreements made between Midway Hospital Medical Center (hereafter referred to as "Hospital") and Simon Pinhas, M.D. (hereafter referred to as "Doctor"). When our respective duly authorized signatures are affixed hereto, the terms of this Agreement shall become binding upon Hospital and Doctor for the period specified.

Doctor shall apply for, obtain and maintain medical staff membership and privileges at Hospital appropriate to the conduct of his practice during the term of this Agreement. Such membership (or temporary membership pending completion of staff application requirements), is to be obtained prior to January 1, 1987.

Doctor shall at all times be and act as an independent contractor with respect to all duties and obligations devolving upon him under this Agreement. Hospital shall neither have nor exercise any control over the methods by which Doctor performs his work. The sole interest and responsibility of Hospital with respect to the manner in which Doctor performs his work is to assure that the quality of care is provided in a competent, efficient and

EXHIBIT "A"

satisfactory manner in accordance with the standards of medical practice in the State of California. Doctor agrees that the standards observed in his medical practice and related activities shall be subject to the bylaws, rules and regulations applying to the medical staff of the Hospital and to the peer review functions of the medical staff and review functions of the Hospital's Board of Directors. Doctor shall comply with all applicable provisions of law and other rules and regulations of any and all governmental authorities relating to ensure and regulation of physician and hospitals.

Doctor agrees to accept the appointment as Summit Nursing Home Liaison with the following duties and responsibilities concurrent with the position.

1. To act as Summit Nursing Home Liaison at the Hospital.
2. To offer in-service educational programs to Hospital staff as appropriate and requested by the in-service Coordinator of the Hospital.
3. To provide at least one continuing medical education program to the general staff bi-annually.
4. To submit quarterly reports to Hospital Administration concerning the progress and development of the Summit Nursing Home Liaison at the Hospital.
5. To offer professional guidance to Hospital Administration for the selection of appropriate capital equipment purchases for the Summit Nursing Home Liaison Program.
6. To inform Hospital of any new advances in the care and treatment of Ophthalmology patients as appropriate.

7. To participate in quality of care studies as may be requested by the Hospital Quality Assurance Committee.

In consideration for the administrative, educational and related services required of and provided by Doctor and in consideration for his abiding by all other provisions of this Agreement, Hospital will compensate Doctor at the rate of \$3,000.00 per month for the period of January 1, 1987 through January 1, 1988 for a total of \$36,000 for the twelve-month period.

Because Hospital has entered into this Agreement in reliance on the personal abilities of Doctor, he may not assign any of his rights or delegate any of his duties arising under this Agreement.

This Agreement shall be terminable by either party, without cause, upon thirty (30) days written notice. In the event of termination, payments owed to Doctor pursuant to this Agreement, if any, will be prorated.

This Agreement shall terminate twelve months after the date of January 1, 1987, unless sooner terminated with notice as provided above, or unless terminated by Hospital, without notice, in any of the following events:

- (a) If Doctor ceases to be duly licensed and authorized to practice medicine and surgery in California; or
- (b) If Doctor fails to maintain membership on the Medical Staff of the Hospital; or
- (c) If Doctor fails to appropriately carry out his duties and responsibilities as Summit Nursing Home Liaison.

We hope that these understandings and agreements are in accord with our negotiations and are acceptable to you.



If this Agreement meets with your approval, please sign on the line provided below and return for final execution.

Sincerely,  
MIDWAY HOSPITAL MEDICAL  
CENTER

By: \_\_\_\_\_  
Philip H. Conen  
Executive Director  
("Hospital")

Accepted by:

\_\_\_\_\_  
Simon Pinhas, M.D.  
("Doctor")

[MIDWAY HOSPITAL MEDICAL CENTER  
LETTERHEAD DELETED]

April 13, 1987

Simon Pinhas, MD  
9033 Wilshire Blvd. #206  
Beverly Hills, CA 90211

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Dear Doctor Pinhas:

In accordance with the Bylaws of the Medical Staff of Midway Hospital Medical Center, Article VII, Section 2, you are hereby advised of the Summary Suspension of all your medical staff privileges; including admitting and surgical.

This suspension shall become effective on April 13, 1987, at 3:00 p.m. The Medical Executive Committee of Midway Hospital Medical Center shall convene to review and consider this action within 10 days as specified in the Bylaws.

This is a result of Medical Staff review of your medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems.

EXHIBIT "B"

A copy of Article VII and Article VIII are enclosed for your information.

Sincerely,

Arthur N. Lurvey, MD  
Chief of Staff

Mitchell Feldman  
Regional Vice-President

[MIDWAY HOSPITAL MEDICAL CENTER  
LETTERHEAD DELETED]

April 20, 1987

Simon Pinhas, MD  
9033 Wilshire Blvd. #206  
Beverly Hills, CA 90211

HAND DELIVERED AND BY  
CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Dear Doctor Pinhas:

Thank you for your statements at the Medical Executive Committee meeting held on April 17, 1987.

Please be advised that the Medical Executive Committee has reviewed and considered the action taken and upheld the summary suspension with a recommendation to terminate your medical staff privileges at Midway Hospital Medical Center. The Board of Directors of Midway Hospital Medical Center has concurred with their recommendation.

Pursuant to the Medical Staff Bylaws, Article VIII, you are entitled to a hearing as outlined in Section 1.a. You have ten days from the date of receipt of this letter to request a hearing by a Judicial Review Committee. Said request shall be by written notice send by certified mail to the Chief Executive Director of the Hospital. If you fail to request a hearing within the specified time frames the recommended action shall become effective immediately.

EXHIBIT "C"



Enclosed is a copy of Article VIII. Please be advised, per the letter dated April 13, 1987, that summary suspension of all privileges includes admitting and surgical privileges.

Sincerely,

Arthur N. Lurvey, MD  
Chief of Staff

## MIDWAY HOSPITAL MEDICAL CENTER MEDICAL STAFF BYLAWS

### PREAMBLE

WHEREAS, Midway Hospital Medical Center is an investor-owned Hospital organized under the laws of the State of California; and

WHEREAS, its purpose is to serve as a general acute care hospital providing patient care, education, and research; and

WHEREAS, it is recognized that one of the aims and goals of the medical staff is to strive for quality patient care in the hospital, that the medical staff must work with and is subject to the ultimate authority of the board, and that the cooperative efforts of the medical staff, administration, and board are necessary to fulfill the hospital's aims and goals in providing quality care to its patients; and

THEREFORE, the physicians, dentists, and podiatrists practicing in this hospital hereby organize themselves into a medical staff in conformity with these bylaws.

### DEFINITIONS

1. HOSPITAL means Midway Hospital Medical Center of Los Angeles, California.

2. BOARD OF DIRECTORS or BOARD means the governing body of the corporation.

3. EXECUTIVE DIRECTOR is the Chief Executive Officer of the Hospital designated by the Board of Directors to be responsible for all aspects of the hospital

**EXHIBIT "D"**

operations, including medical staff liaison and coordination. In the absence of the EXECUTIVE DIRECTOR, the Associate Executive Director shall assume all the responsibilities of the Executive Director.

4. MEDICAL STAFF means the formal organization of all licensed physicians, dentists and podiatrists who are privileged to attend patients in the hospital.

5. MEDICAL EXECUTIVE COMMITTEE or MEC means the executive committee of the medical staff.

6. CLINICAL PRIVILEGES or PRIVILEGES means the permission granted to a practitioner to render specific diagnostic, therapeutic, medical, dental, podiatric, or surgical services.

7. PHYSICIAN means any individual with an M.D. or D.O. degree who is fully licensed to practice medicine in all its phases.

8. PRACTITIONER means, unless otherwise expressly limited, any physician, dentist, or podiatrist applying for, or exercising clinical privileges in this hospital.

9. SPECIFIED PROFESSIONAL PERSONNEL means an individual, other than a licensed physician, dentist, or podiatrist, who exercises independent judgment within the areas of his professional competence and who is qualified to render direct or indirect medical, dental, podiatric, or surgical care under the supervision of a practitioner who has been accorded privileges to provide such care in the hospital.

10. MEDICAL STAFF YEAR means the period from January 1st to December 31st.

11. EX OFFICIO means service as a member of a body by virtue of an office or position held and, unless

otherwise expressly provided, means without voting rights.

12. SPECIAL NOTICE means written notification sent by certified or registered mail, return receipt requested.

13. MEDICO-ADMINISTRATIVE OFFICER means a practitioner engaged by the hospital on a full-time or part-time basis to perform duties which, although partially administrative, include clinical responsibilities.

14. As used in the Bylaws, the masculine gender includes both masculine and feminine.

## ARTICLE I

### NAME

The name of this organization shall be Medical Staff of Midway Hospital Medical Center.

## ARTICLE VIII

### HEARING AND APPEAL PROCEDURES

#### Section 1. REQUEST FOR HEARING

##### a. Notice of Decision

In all cases in which a practitioner is entitled to a hearing as set forth herein, he shall have ten (10) days following the date of receipt of written notice of the action giving rise to the right to the hearing, sent registered or certified mail, within which to request a hearing by a judicial review committee hereinafter referred to. Said request shall be by written notice sent certified or registered mail to the Chief Executive Officer. In the event the applicant member does not request a hearing



within the time and in the manner hereinabove set forth, he shall be deemed to have waived his right to a hearing and to any appellate review to which he might otherwise have been entitled and to have accepted the action involved, and it shall thereupon become effective immediately.

#### b. Grounds for Hearing

Any one or more of the following actions shall constitute grounds for a hearing:

- (1) Denial of medical staff membership;
- (2) Denial of requested advancement in medical staff membership;
- (3) Denial of medical staff reappointment;
- (4) Demotion to lower staff reappointment;
- (5) Suspension to lower staff category;
- (6) Expulsion from medical staff membership;
- (7) Denial of requested privileges;
- (8) Reduction in privileges;
- (9) Suspension of privileges;
- (10) Termination of privileges;
- (11) Denial of increase in privileges.

#### c. Time and Place for Hearing

Upon receipt of a request for hearing, the Chief Executive Officer shall deliver such request to the Chief of Staff or designee. The Chief Executive Officer or his designee shall, within ten (10) days after receipt of such request, schedule and arrange for a hearing. The Chief Executive Officer or his designee shall give notice to the affected practitioner of the time, place, and date of the hearing.

The date of the hearing shall be within forty-five (45) days from the date of receipt of the request for a hearing by the Chief Executive Officer. When the request is received from a member who is under suspension, which is then in effect, the hearing shall be held as soon as the arrangements may reasonably be made, but not to exceed fifteen (15) days from the date of receipt of the request for a hearing.

#### d. Notice of Charges

The notice of hearing shall state in concise language the acts of omissions with which the practitioner is charged, a list of any charts under question by chart number or where the issue involves any of the actions set out in Section 1.b. of Article VIII, the reasons for the denial of the request of the applicant or medical staff member.

#### e. Judicial Review Committee

When a hearing is requested, the Chief of Staff, with the approval of the Medical Executive Committee, shall appoint a judicial review committee which shall be composed of not less than five (5) members of the active medical staff to act pursuant to this Article. The members of the judicial review committee shall not have actively participated in the consideration of the matter involved at any previous level. Such appointment shall include designation of the chairman. Knowledge of the matter involved shall not preclude a member of the active medical staff from serving as a member of the judicial review committee. In the event that it is not possible to appoint a fully qualified judicial review committee from the active medical staff, the Medical Executive Committee may appoint qualified physicians from the associate staff or physicians outside the staff.

#### f. Postponements and Extensions

Postponements and extensions of time beyond the times expressly permitted in these bylaws may be requested by anyone but shall be permitted by the judicial review committee only on a showing of good cause.

#### g. Decision of the Hearing Committee

Within thirty (30) days after final adjournment of the hearing, except in the case of a medical staff member who shall be under suspension and then within fifteen (15) days, the judicial review committee shall render a decision which shall be delivered to the Medical Executive Committee and to the Governing Board, such decision to be accompanied by a written report, all other documentation, and the hearing record if prepared. The report shall contain a concise statement of the reasons for the decision, and a copy of the report and decision shall be delivered, by registered or certified mail, to the affected practitioner.

#### h. Appeal

The decision of the judicial review committee shall be considered final, subject to the right of appeal as provided in Section 3 (Appeal to Governing Board) of this Article.

### Section 2. HEARING PROCEDURE

#### a. Personal Presence Mandatory

Under no circumstances shall the hearing be conducted without the personal presence of the person requesting the hearing unless he has waived such appearance or has failed without good cause to appear after appropriate notice. Such failure to appear shall be deemed to constitute a waiver of the right to such appearance. This does not waive the right to appeal to the Governing Board.

#### b. Representation

The affected practitioner shall be entitled to be accompanied by and/or represented at the hearing by a member of the medical staff in good standing, except if the member of the medical staff is also an attorney. Since the hearings provided for in these bylaws are for the purpose of intra-professional competency or conduct, neither the person requesting the hearing, the Medical Executive Committee, nor the Governing Board shall be represented in any phase of the hearing or appeals procedure by an attorney at law unless the hearing committee, in its discretion, permits both sides to be represented by legal counsel. The body whose decision prompted the hearing shall appoint a representative from the medical staff to present its recommendations in support thereof and to examine witnesses.

#### c. The Presiding Officer

The presiding officer at the hearing shall be the chairman or the hearing officer if one is appointed. The presiding officer shall act to insure that all participants in the hearing have a reasonable opportunity to be heard, and to present all oral and documentary evidence, and that decorum is maintained. He shall determine the order or procedure during the hearing and shall have the authority and discretion in accordance with these bylaws to make all rulings on questions which pertain to matters of law and to the admissibility of evidence.

#### d. The Hearing Officer

At the request of the person who requested the hearing, the Executive Committee, the Judicial Review Committee, or on its own initiative, the Governing Board may appoint a hearing officer who may be an attorney at law to preside at the hearing. Such hearing officer may be legal counsel



to the hospital provided he acts during the hearing in accord with this Article. He must not act as a prosecuting officer, as an advocate for the hospital, Governing Board, or Medical Executive Committee, or body whose action prompted the hearing. If requested by the Judicial Review Committee, he may participate in the deliberation of such body and be a legal advisor to it, but he shall not be entitled to vote.

#### e. Record of Hearing

The Judicial Review Committee must maintain a record of the hearing by one of the following methods: a shorthand reporter present to make a record of the hearing or a recording. The cost of such shorthand reporter's appearance shall be borne by the hospital and the party requesting the hearing, provided the cost of transcribing the record of the hearing shall be borne by the party requesting the transcription. The hearing committee may, but shall not be required to, order that oral evidence shall be taken only on oath or affirmation administered by any person designated by such body and entitled to notarize documents in the State of California.

#### f. Rights of the Parties

At a hearing, both the affected practitioner and the body whose action prompted the hearing shall have the following rights: to call and examine witnesses, to introduce exhibits, to cross-examine any witness on any matter relevant to the issues, to impeach any witness and to rebut any evidence. If the affected practitioner does not testify in his own behalf, he may be called and examined as if under cross-examination. The presiding officer in the exercise of his discretion may limit testimony that is cumulative.

#### g. Admissibility of Evidence

The hearing shall not be conducted according to rules of law relating to the examination of witnesses or presentation of evidence. Any relevant evidence shall be admitted by the presiding officer if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the admissibility of such evidence, in a court of law. Each party shall have the right to submit written argument, and the judicial review committee may request such a writing to be filed following the close of the hearing. The judicial review committee may interrogate the witnesses or call additional witnesses if it deems it appropriate.

#### h. Official Notice

The presiding officer shall have the discretion to take official notice of any matters either technical or scientific, relating to the issues under consideration which could have been judicially noticed by the courts of this State. Participants in the hearing shall be informed of the matters to be officially noticed or to refute the noticed matters by evidence or by written or oral presentation of authority. Reasonable or additional time shall be granted, if requested, to present written rebuttal of any evidence admitted on official notice.

#### i. Basis of Decision

The decision of the hearing committee shall be based on the evidence produced at the hearing. This evidence may consist of the following:

- 1) Oral testimony of witnesses;
- 2) Briefs or written arguments presented in connection with the hearing;

3) Any material contained in the medical staff's personnel files regarding the person who requested the hearing;

4) Any and all applications, references and accompanying documents;

5) All officially noticed matters;

6) Any other evidence deemed admissible under Section 2,g. of this Article.

#### j. Burden of Proof

In all cases specified in Section 1,b. of this Article, it shall be incumbent on the person who requested the hearing to initially come forward with evidence in his support. Thereafter, the burden shall shift to the body or committee whose decision prompted the hearing to come forward with evidence in support of its action or decision.

In all cases in which a hearing is conducted under this Article, after all the evidence has been submitted by both sides, the Judicial Review Committee shall rule against the person who requested the hearing unless it finds that he or she has proved by a preponderance of the evidence, that the decision that prompted the hearing was arbitrary or unreasonable, and should not be sustained by the evidence.

#### k. Adjournment and Conclusion

The presiding officer may adjourn the hearing and reconvene the same at the convenience of the participants without special notice. Upon conclusion of the presentation of oral and written evidence, the hearing shall be closed. The Judicial Review Committee shall thereupon, within the time limit specified in Section 1,g. of this Article, outside of the presence of any other person, conduct its deliberations and render a decision and ac-

companying report as provided by Section 1 of this Article.

### Section 3. APPEAL TO GOVERNING BOARD

#### a. Time for Appeal

Within ten (10) days after receipt of the decision of the Judicial Review Committee, either the person who requested the hearing or the body whose decision prompted the hearing may request an appellate review by the Governing Board. The request shall be delivered to the Governing Board in writing and delivered either in person or by certified or registered mail. If such appellate review is not requested within such period, both sides shall be deemed to have accepted the action involved and it shall thereupon become final and shall be effective immediately. The written request for appeal shall also include a brief statement as to the reasons for appeal.

#### b. Grounds for Appeal

The grounds for appeal from the hearing shall be: 1) substantial failure of the hearing committee, Medical Executive Committee, or Governing Board to comply with the procedures required by this Article or by the hospital medical staff bylaws in the conduct of hearing and decisions upon hearing so as to deny a fair hearing; 2) action taken arbitrarily or capriciously.

#### c. Time, Place, and Notice

In the event of any appeal to the Governing Board as set forth in the preceding subsection, the Governing Board shall, within ten (10) days after receipt to such notice of appeal, schedule a date for such review. The Governing Board through the Executive Director, shall notify the affected practitioner by certified or registered mail of the time, place, and date of the appellate review.



The date of appellate review shall not be less than fifteen (15) days, nor more than forty-five (45) days from the date of receipt of the request for appellate review, provided, however, that when a request for appellate review is from a member who is under suspension which is then in effect, the appellate review shall be held as soon as the arrangements may reasonably be made and not to exceed fifteen (15) days from the date of receipt of the request for appellate review unless additional time is required to complete the record. The time for appellate review may be extended by the chairman of the Governing Board for a good cause.

#### d. Hearing Officer

The Governing Board may appoint a hearing officer to preside over its hearing who may be the same or a different hearing officer as the one who presided over the hearing of the Judicial Review Committee. The same rules set forth above with respect to the hearing officer for the Judicial Review Committee shall apply to the hearing officer for the hearing before the Governing Board.

#### e. Nature of Appellate Review

The proceedings by the governing Board shall be in the nature of an appellate hearing based upon the record of the hearing before the Judicial Review Committee, provided that the Governing Board may, in its sole discretion, accept additional oral or written evidence subject to the same rights of crossexamination or confrontation provided at the original hearing. Each party shall have the right to present, within ten (10) days prior to the date of the review, a written statement in support of his position on appeal, and in its sole discretion, the Governing Board may allow each party or representative to personally appear and make oral argument. At the conclu-

sion of oral argument, if allowed, the Governing Board may thereupon at a time convenient to itself conduct deliberations outside the presence of the appellant and respondent and their representatives. The Governing Board may affirm, modify, or reverse the decision of the Judicial Review Committee.

#### f. Final Decision

Within ten (10) days after the conclusion of the appellate review, the Governing Board shall render a final decision in writing and shall deliver copies thereof to the affected practitioner and to the Medical Executive Committee in person or by certified or registered mail. The final decision of the Governing Board following the appeal shall be effective immediately and shall not be subject to further review.

#### g. Right to One Hearing Only

Except as otherwise provided in this Article, an affected practitioner shall be entitled as a matter of right to only one hearing before the Judicial Review Committee and one hearing before the Governing Board on any single matter which may be the subject of an appeal without regard to whether such subject is the result of action by the Medical Executive Committee or the Governing Board, or a combination of acts of such bodies.

## ARTICLE IX

### SPECIFIED PROFESSIONAL PERSONNEL

#### Section 1. APPOINTMENT AND ASSIGNMENT

Specified professional personnel, sometimes referred to as "allied health professionals", may be authorized by the medical staff to perform their professional services within

the hospital. They shall be individually authorized and assigned to an appropriate clinical department and shall carry out their professional activities under the supervision of the chairman of the department, or the appropriate attending staff member assigned responsibility, and subject to departmental policies and procedures.

## Section 2. QUALIFICATIONS

a. The general qualifications to be required of members of each category of specified professional personnel shall be determined by the appropriate department concerned. The chairman of the department concerned shall submit a listing of such qualifications to the Medical Executive Committee for approval.

b. Specified professional personnel shall not be eligible for appointment of membership on the Medical Staff. Nothing herein shall create any vested rights in any Specified Professional Personnel to receive or to maintain any privileges in the Hospital. The provisions of Article VII and Article III of these bylaws shall not apply to specified professional personnel.

c. Each individual in this category shall have an appropriate application on file, and their department shall review and approve such. The application shall include evidence of licensure, training, and documentation of malpractice insurance.

## [LAWRENCE SILVER A LAW CORPORATION LETTERHEAD DELETED]

April 30, 1987

DELIVERED BY TELECOPIER,  
HAND DELIVERED, AND  
MAILED VIA CERTIFIED MAIL —  
RETURN RECEIPT REQUESTED

Arthur N. Lurvey, M.D.  
Chief of Staff

Midway Hospital Medical Center  
5925 San Vicente Boulevard  
Los Angeles, CA 90019

Re: Medical Staff Privileges

Dear Dr. Lurvey:

Please be advised that I represent Simon J. Pinhas, M.D. and I am authorized on his behalf to demand a hearing upon his summary suspension of medical staff privileges from Midway Hospital Medical Center ("Midway Hospital") and the Medical Staff of Midway Hospital Medical Center ("Medical Staff"). Dr. Pinhas demands that the hearing and the notice of charges be in conformity with the rights afforded to Dr. Pinhas by the Constitutions of the State of California and of the United States, the laws of the State of California, the contractual obligations imposed upon Midway Hospital and the Medical Staff, and to the extent that they are not inconsistent therewith, the Bylaws of the Medical Staff.

1. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests full disclosure of all charges against him with sufficient particularity that he may investigate and rebut those charges.

EXHIBIT "E"



2. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands that all proceedings be reported by a certified shorthand reporter.

3. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests access to the originals and a photocopy of all charts in their full, complete, and unaltered state, which have been used *or considered* in connection with bringing charges against Dr. Pinhas.

4. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a hearing officer who is a retired judge of the Superior Court, or, in the alternative, someone whose impartiality cannot be questioned. Further, Dr. Pinhas requests that the identity of the hearing officer be made known as soon as possible so that pre-hearing motions may be submitted to him and determine in advance of the hearing, including, but not limited to, motions to compel compliance with the demands herein made.

5. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the minutes of any meeting of any members of the staff of Midway Hospital or its Medical Staff in connection with considering to bring and the bringing of any charges against him.

6. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests all writings, as that term is defined by Section 250 of the California Evidence Code, and all copies which in any way are different therefrom, regarding any communication regarding his medical staff privileges or his performance as a physician at Midway Hospital.

7. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests all writings which are exculpatory to any charges or any sanction which might be sought to be imposed.

8. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a list of all witnesses to any of the events

involving the charges whether or not they are intended to be called at the time of the hearing.

9. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a list of all witnesses who the Hospital intends to call at the time of the hearing.

10. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a written summary of the direct testimony of all witnesses who will be called in the proceedings against him.

11. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the opportunity to interview all witnesses who may be called as witnesses against him.

12. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the assurance that the Hospital shall require its employees who he designates and the Medical Staff shall require that all of its members, as required by the Bylaws, be available to testify, if so requested by Dr. Pinhas, at the hearing in this matter.

13. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that all reports of expert witnesses to be called by the Hospital be submitted to him no less than 10 days prior to their being called as witnesses and that the Hospital be precluded from calling any expert witness if such report is not made available.

14. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a hearing panel composed of physicians not members of the staff of Midway Hospital and that all members of the hearing panel be free of bias, prejudice, prejudgment and not possessed of any information regarding any of the charges in advance of the hearing.

15. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the identity of the members of the hearing panel

be disclosed to him as soon as possible so that he may determine whether or not to file motions for disqualifications in advance of the hearing date.

16. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that the hearing panel be instructed immediately upon selection that they are not to discuss this matter with any person, including, but not limited to, the person or persons who will represent the Hospital or the Medical Staff or any witnesses that the Hospital may call. In the event that such discussion is had with them, they are required to report it immediately to Dr. Pinhas or his counsel and possibly volunteer their disqualification from the case.

17. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that all witnesses who are intended to be called at the hearing be instructed not to discuss the matter with any members of the hearing panel.

18. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the right to be represented by a physician who is also an attorney at the hearing. He requests that this physician who is also an attorney present and argue motions on his behalf, examine and cross-examine witnesses, may introduce evidence, and fully and completely participate in the hearing and protect the record.

19. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that he be represented by an attorney at the hearing. He request that this attorney present and argue motions on his behalf, examine and cross-examine witnesses, may introduce evidence, and fully and completely participate in the hearing and protect the record.

20. Pursuant to all of his rights, in the event that either or both of the above requests are denied, he request that his attorney appear in the hearings to make all legal

arguments to protect his record, introduce evidence, and to cross-examine witnesses, or in some fashion be permitted to participate in the hearing.

21. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that in the event that the above three requests are denied, he requests the opportunity to have his attorney sit in the hearing and advise him during the course of proceedings without actual participation in the hearing.

22. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands production of all communications with the Department of Health Services or any governmental agency regarding his practice of medicine.

23. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands production of all contracts between Midway Hospital or Summit, or any affiliates, parents or subsidiaries, with any member of the Medical Staff for purposes of determining bias, interest or for purposes of impeachment or any other appropriate evidentiary purpose.

24. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands the identification of all persons selected as a hearing officer and all persons selected by the Hospital sit on the panel so that he may have time to investigate their impartiality, determine whether to conduct appropriate voir dire examination, or to seek, other relief in connection with their appointment.



Pursuant to my agreement with Mr. Kadzielski of Weissburg & Aronson, this demand signed by me is timely and effective if served upon you (or a person in charge) at the Administrator's office at the Hospital or delivered to you (or a person in charge) at your office, or telecopied to Mark Kadzielski at his office before midnight, April 30, 1987.

Sincerely,

Lawrence Silver

cc: Arthur N. Lurvey, M.D. (Hand Delivered)  
435 N. Roxbury, Suite 100  
Beverly Hills, CA 90210  
  
Simon J. Pinhas, M.D.  
Mark Kadzielski, Esq.

[MIDWAY HOSPITAL MEDICAL CENTER  
LETTERHEAD DELETED]

May 7, 1987

Simon Pinhas, MD  
9033 Wilshire Blvd. #206  
Beverly Hills, CA 90211

BY: CERTIFIED MAIL  
HAND  
DELIVERED:  
(5/7/87)

Dear Doctor Pinhas:

This letter is in response to your request for a hearing at Midway Hospital Medical Center related to your summary suspension and the recommendation to terminate your medical staff membership. Pursuant to Article VIII, Section I.e., this hearing will be held at 6:30 p.m. on May 12, 1987 in the Pavilion Conference Room.

A Judicial Review Committee has been appointed by the Chief of Staff. Its Chairman is Ellis Berkowitz, MD, and its members are: John Hofbauer, MD; Jay Jordan, MD; Debra Judelson, MD; Alan Kessler, MD; Dwight Makoff, MD and Stephen Seiff, MD. These committee members have been advised not to discuss this matter with you or any other member of the Hospital's Medical Staff.

The decisions to summarily suspend and to terminate your membership at Midway Hospital Medical Center were based on reviews of your patient records involving ophthalmological surgeries conducted at this Hospital in

EXHIBIT "F"

1987. These reviews concluded that your conduct of patient care was below the acceptable standard of care in this Hospital.

The specific charges that support this conclusion, and the specific charts that support these charges are as follows:

**1. JUDGMENT TO PROCEED WITH SURGERY NOT WITHIN STANDARD OF CARE IN HOSPITAL.**

**A. No History and Physical on patient chart prior to surgery:**

Chart #7071027	Chart #7066244
Chart #7070713	Chart #7063199
Chart #7070489	Chart #7059728
Chart #7070403	Chart #7059574
Chart #7070179	Chart #7029896/
Chart #7067615	2885069

**B. Incomplete Pre-Operative workup:**

Chart #7087136	Chart #7075332
Chart #7084633	Chart #7073054
Chart #7084609	Chart #7072376
Chart #7084595	Chart #7070543
Chart #7083955	Chart #7070004
Chart #7082142	Chart #7069979
Chart #7081316	Chart #7068204
Chart #7079249	Chart #7067836
Chart #7078307	Chart #7066244
Chart #7078293	Chart #7065167
Chart #7078285	Chart #7065094
Chart #7078145	Chart #7063059
Chart #7078072	Chart #7062664
Chart #7075979	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075928	Chart #7057172
Chart #7075375	Chart #7051832

**C. Surgery contraindicated by patients' medical condition:**

Chart #7087365	Chart #7070446
Chart #7087136	Chart #7068204
Chart #7084663	Chart #7065183/
Chart #7084609	2909006
Chart #7083998	Chart #7065094
Chart #7082142	Chart #7065035
Chart #7081316	Chart #7062664
Chart #7079249	Chart #7062664
Chart #7078102	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075529	Chart #7056915
Chart #7072392	Chart #7054459
Chart #7072376	Chart #7029896/
	2885069

**2. FAILURE TO OBTAIN REQUIRED CONSENT FOR PROCEDURE PERFORMED.**

**A. Lack of appropriate consent for procedure performed:**

Chart #7068204	Chart #7065086/
Chart #7067674	2908727
Chart #7066244	Chart #7063318

**B. Lack of informed consent for surgery:**

Chart #7085788	Chart #7078129
Chart #7084099	Chart #7075456
Chart #7081936	Chart #7072422
Chart #7081928	Chart #7068182
Chart #7079397	Chart #7068107
Chart #7079389	Chart #7065019
Chart #7078293	Chart #7062699
	Chart #7057172



C. No IntraOcular Lens Consent:

Chart #7084692	Chart #7065086/
Chart #7084684	2908727
Chart #7083947	Chart #7063318
Chart #7082142	Chart #7062699
Chart #7079273	Chart #7062672
Chart #7072724	Chart #7062605
Chart #7070713	Chart #7062532
Chart #7070535	Chart #7059639
Chart #7067585	Chart #7057687
Chart #7066244	Chart #7057563
Chart #7065153	Chart #7057172
Chart #7065132	Chart #7029896/
	2885069

3. NO ASSISTANT AT SURGERY AS REQUIRED BY MEDICAL STAFF BYLAWS:

Chart #7057644	Chart #7057563
Chart #7057636	Chart #7057555
Chart #7057628	Chart #7057547

The Judicial Review Committee has been polled with regard to your requests for representation by counsel, pursuant to Article VIII., Section 2.b. You are hereby advised that the Committee has unanimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing. You are entitled, as that section indicates, to be represented by a member of the Medical Staff in good standing. If you will be represented by a staff member, please inform the undersigned of the identity of that person so that further communication regarding this matter can also be directed to that person.

A Hearing Officer, Richard Posell, Esq., has been appointed by the Governing Board. Mr. Posell is a part-

ner in the law firm of Shapiro, Posell & Close and is experienced at conducting hearings of this type at hospitals. A certified shorthand reporter has also been ordered to maintain a record of the hearing.

If you wish to review the charts in question prior to the hearing, please contact Peggy Farber RN, Director of Quality Assurance at 932-5231 or 932-5022 to make these arrangements. If copies of these records are requested, arrangements can be made with Ms. Farber after you have completed the appropriate Non-Disclosure Agreement. Copies will be handled at your own expense.

The hearing will be conducted pursuant to the provisions of Article VIII of the Midway Hospital Medical Center Medical Staff Bylaws. Those Bylaws do not provide for pre-hearing discovery of any documents or information related to the proceedings. Additionally, the Hospital does not have subpoena power or other powers to compel any one to testify at a medical staff hearing.

While the Medical Staff is not required under the Bylaws to provide you with a list of witnesses it intends to call at the hearing, the following is a list of those persons who are currently expected to testify on behalf of the Medical Staff at the hearing: Alan Friedman, MD; Arthur Lurvey, MD; Jonathan Macy, MD; James Salz, MD and Maurice Schmir, MD. the Medical Staff reserves the right to add to this list, or delete from it at any time.

Please provide the undersigned with a list of your witnesses as soon as possible.

Very truly yours,

Mitchell Feldman  
Regional Vice-President

cc: Lawrence Silver, Esq.

**JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER**

In The Matter Of  
**SIMON J. PINHAS, M.D.**  
*Respondent.*

**LAWRENCE SILVER**  
**A LAW CORPORATION**  
9100 Wilshire Boulevard, Suite 360  
Beverly Hills, California 90212  
(213) 274-1530

**LAWRENCE SILVER**  
*Attorney for Plaintiff*  
*Simon D. Pinhas, M.D.*

**RESPONDENT'S OBJECTIONS  
TO THE NOTICE OF HEARING**

Date: May 12, 1987, Time: 630 a.m.  
Place: Pavillion Conference Room

COMES NOW Simon J. Pinhas, M.D., Respondent, appearing specially and without waiving any rights to challenge the jurisdiction of this committee and other deficiencies in the notice, and hereby notifies the Judicial Review Committee of his objections to the hearing date as noticed herein. Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 13, 1987, Dr. Pinhas was advised by Midway Hospital Medical Center ("Midway") that he was summarily suspended as of that date of all medical staff, including admitting and surgical, privileges. The letter stated that such action was the result of a: "medical staff review of Dr. Pinhas's medical records,

**EXHIBIT "G"**



with consideration as to the questions raised regarding: indication for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." (A copy of the April 13 letter is attached hereto as Exhibit "1".)

2. By the same letter, Dr. Pinhas was advised that the Midway Medical Executive Committee would convene to review and consider the action within 10 days.

3. On April 20, Dr. Pinhas, while present at Midway in connection with other matters, was beckoned to attend — immediately — a meeting. He did so, and this meeting turned out to be the Midway Medical Executive Committee ("Executive Committee") meeting.

4. The Executive Committee requested that Dr. Pinhas make a statement. Lacking notice, unprepared, confused and without benefit of legal or fellow staff advice, he did so briefly.

5. By letter dated April 20, 1987, Midway notified Dr. Pinhas that the Medical Executive Committee had upheld the summary suspension with a recommendation to terminate his staff privileges at Midway. He was also informed that the Midway Board of Directors had concurred with the Executive Committee's recommendation. (A copy of the April 20 letter is attached hereto as Exhibit "2".)

6. In accordance with the Midway Medical Staff By-laws, Dr. Pinhas requested a hearing by the Judicial Review Committee by letter dated April 30, 1987. (A copy of the April 30 letter is attached hereto as Exhibit "3".)

7. On May 7, 1987, counsel for respondent telephoned counsel for Midway to determine the status of the notice of hearing herein. Counsel for respondent was advised

that a letter representing such notice would be hand-delivered that day.

8. On the same day, May 7, counsel for respondent telephoned once again, after 5:00 p.m., to ascertain the whereabouts of the notice of hearing. After 5:30 p.m., the notice of hearing was delivered. (A copy of the May 7 letter is attached hereto as Exhibit "4".)

9. The notice of hearing scheduled this matter to be heard at 6:30 p.m. on May 12, 1987.

10. Respondent was thereby informed of the charges, albeit inadequately, and allowed as notice only two business days — with an intervening weekend — to prepare a defense in this matter.

11. Under these circumstances, proceeding with the hearing as scheduled would not only work a hardship to respondent, be detrimental to reasonable preparation, but would also constitute an obvious deprivation of fair procedure and due process.

12. The notice of hearing itself is deficient, lacking as it does specificity and detail. Although the notice sets forth what it labels "specific charges" and lists "specific charts" it contends will support those charges, the charges are rendered in broad, general terms.

13. The identified charts as of the date of this Objection, have not been made available, and are not available, to respondent or his counsel. Approximately 128 charts are identified, though some appear to be duplicates.

14. Furthermore, the "notice" does not provide the name of the prosecuting medical staff representative, and summarily — and in a self-serving prophylactic fashion — dismisses anticipated respondent requests that more

properly should be heard on motion before the Judicial Review Committee.

15. Moreover, the Midway Medical Staff Bylaws contemplate that the Chief Executive Officer or a designee member of the Medical Staff shall execute the notice of the hearing. In this additional regard, the notice of hearing lacks authentication and is defective.

16. Simply stated, the "notice" does not provide a reasonable quantum of time in which respondent can prepare, present and have decided the preliminary motions that must be resolved — with respect to procedure and substance herein — prior to the hearing in this matter.

17. Without more specific information, without possession and sufficient review and analysis of documentary evidence, the hearing as established and scheduled, contravenes respondent's rights, under the United States and California Constitutions, the laws of the State of California, and the contractual obligations imposed upon Midway Hospital and the Medical Staff, to fair notice and a rational and meaningful opportunity to be heard.

WHEREFORE, respondent requests that the Judicial Review Committee sustain his objections and dismiss the notice of hearing as totally defective.

DATED: May 8, 1987 —

LAWRENCE SILVER  
A LAW CORPORATION

By: \_\_\_\_\_ (signature)  
Lawrence Silver, Attorneys for  
Simon J. Pinhas, M.D.

[MIDWAY HOSPITAL MEDICAL CENTER  
LETTERHEAD DELETED]

April 13, 1987

Simon Pinhas, MD  
9033 Wilshire Blvd. # 206  
Beverly Hills, CA 90211

CERTIFIED MAIL  
RETURN RECEIPT  
REQUESTED

Dear Doctor Pinhas:

In accordance with the Bylaws of the Medical Staff of Midway Hospital Medical Center, Article VII, Section 2, you are hereby advised of the Summary Suspension of all your medical staff privileges; including admitting and surgical.

This suspension shall become effective on April 13th, 1987, at 3:00 p.m. The Medical Executive Committee of Midway Hospital Medical Center shall convene to review and consider this action within 10 days as specified in the Bylaws.

This is a result of Medical Staff review of your medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems.

A copy of Article VII and Article VIII are enclosed for your information.

Sincerely,

Arthur N. Lurvey, MD  
Chief of Staff

Mitchell Feldman  
Regional Vice-President

EXHIBIT "1"



[MIDWAY HOSPITAL MEDICAL CENTER  
LETTERHEAD DELETED]

April 20, 1987

Simon Pinhas, MD  
9033 Wilshire Blvd. # 206  
Beverly Hills, CA 90211

HAND DELIVERED AND BY  
CERTIFIED MAIL  
RETURN RECEIPT  
REQUESTED

Dear Doctor Pinhas:

Thank you for your statements at the Medical Executive Committee meeting held on April 17, 1987.

Please be advised that the Medical Executive Committee has reviewed and considered the action taken and upheld the summary suspension with a recommendation to terminate your medical staff privileges at Midway Hospital Medical Center. The Board of Directors of Midway Hospital Medical Center has concurred with their recommendation.

Pursuant to the Medical Staff Bylaws, Article VIII, you are entitled to a hearing as outlined in Section 1.a . . . You have ten days from the date of receipt of this letter to request a hearing by a Judicial Review Committee. Said request shall be by written notice send [sic] by certified mail to the Chief Executive Director of the Hospital. If you fail to request a hearing within the specified time frames the recommended action shall become effective immediately.

Enclosed is a copy of Article VIII. Please be advised, per the letter dated April 13, 1987, that summary suspension of all privileges includes admitting and surgical privileges.

Sincerely,

Arthur N. Lurvey, M.D.  
Chief of Staff

EXHIBIT "2"

[LAWRENCE SILVER A LAW CORPORATION  
LETTERHEAD DELETED]

April 30, 1987

DELIVERED BY TELECOPIER,  
HAND DELIVERED, AND  
MAILED VIA CERTIFIED MAIL —  
RETURN RECEIPT REQUESTED

Arthur N. Lurvey, M.D.  
Chief of Staff  
Midway Hospital Medical Center  
5925 San Vicente Boulevard  
Los Angeles, CA 90019

Re: Medical Staff Privileges

Dear Dr. Lurvey:

Please be advised that I represent Simon J. Pinhas, M.D. and I am authorized on his behalf to demand a hearing upon his summary suspension of medical staff privileges from Midway Hospital Medical Center ("Midway Hospital") and the Medical Staff of Midway Hospital Medical Center ("Medical Staff"). Dr. Pinhas demands that the hearing and the notice of charges be in conformity with the rights afforded to Dr. Pinhas by the Constitutions of the State of California and of the United States, the laws of the State of California, the contractual obligations imposed upon Midway Hospital and the Medical Staff, and to the extent that they are not inconsistent therewith, the Bylaws of the Medical Staff.

1. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests full disclosure of all charges against him with sufficient particularity that he may investigate and rebut those charges.

EXHIBIT "3"

2. Pursuant to all of Dr. Pinhas's right, Dr. Pinhas demands that all proceedings be reported by a certified shorthand reporter.

3. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests access to the originals and a photocopy of all charts in their full, complete, and unaltered state, which have been used or considered in connection with bringing charges against Dr. Pinhas.

4. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a hearing officer who is a retired judge of the Superior Court, or, in the alternative, someone whose impartiality cannot be questioned. Further, Dr. Pinhas requests that the identity of the hearing officer be made known as soon as possible so that pre-hearing motions may be submitted to him and determine [sic] in advance of the hearing, including, but not limited to, motions to compel compliance with the demands herein made.

5. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the minutes of any meeting of any members of the staff of Midway Hospital or its Medical Staff in connection with considering to bring and the bringing of any charges against him.

6. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests all writings, as that term is defined by Section 250 of the California Evidence Code, and all copies which in any way are different therefrom, regarding any communication regarding his medical staff privileges or his performance as a physician at Midway Hospital.

7. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests all writings which are exculpatory to any charges or any sanction which might be sought to be imposed.

8. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a list of all witnesses to any of the events

involving the charges whether or not they are intended to be called at the time of the hearing.

9. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a list of all witnesses who the Hospital intends to call at the time of the hearing.

10. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a written summary of the direct testimony of all witnesses who will be called in the proceedings against him.

11. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the opportunity to interview all witnesses who may be called as witnesses against him.

12. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the assurance that the Hospital shall require its employees who he designates and the Medical Staff shall require that all of its members, as required by the Bylaws, be available to testify, if so requested by Dr. Pinhas, at the hearing in this matter.

13. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that all reports of expert witnesses to be called by the Hospital be submitted to him no less than 10 days prior to their being called as witnesses and that the Hospital be precluded from calling any expert witness if such report is not made available.

14. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests a hearing panel composed of physicians not members of the staff of Midway Hospital and that all members of the hearing panel be free of bias, prejudice, prejudgment and not possessed of any information regarding any of the charges in advance of the hearing.

15. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the identity of the members of the hearing panel



be disclosed to him as soon as possible so that he may determine whether or not to file motions for disqualifications in advance of the hearing date.

16. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that the hearing panel be instructed immediately upon selection that they are not to discuss this matter with any person, including, but not limited to, the person or persons who will represent the Hospital or the Medical Staff or any witnesses that the Hospital may call. In the event that such discussion is had with them, they are required to report it immediately to Dr. Pinhas or his counsel and possibly volunteer their disqualification from the case.

17. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that all witnesses who are intended to be called at the hearing be instructed not to discuss the matter with any members of the hearing panel.

18. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests the right to be represented by a physician who is also an attorney at the hearing. He requests that this physician who is also an attorney present and argue motions on his behalf, examine and cross-examine witnesses, may introduce evidence, and fully and completely participate in the hearing and protect the record.

19. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that he be represented by an attorney at the hearing. He request [sic] that this attorney present and argue motions on his behalf, examine and cross-examine witnesses, may introduce evidence, and fully and completely participate in the hearing and protect the record.

20. Pursuant to all of his rights, in the event that either or both of the above requests are denied, he requests that his attorney appear in the hearings to make all

legal arguments to protect his record, introduce evidence, and to cross-examine witnesses, or in some fashion be permitted to participate in the hearing.

21. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas requests that in the event that the above three requests are denied, he requests the opportunity to have his attorney sit in the hearing and advise him during the course of proceedings without actual participation in the hearing.

22. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands production of all communications with the Department of Health Services or any governmental agency regarding his practice of medicine.

23. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands production of all contracts between Midway Hospital or Summit, or any affiliates, parents or subsidiaries, with any member of the Medical Staff for purposes of determining bias, interest or for purposes of impeachment or any other appropriate evidentiary purpose.

24. Pursuant to all of Dr. Pinhas's rights, Dr. Pinhas demands the identification of all persons selected as a hearing officer and all persons selected by the Hospital sit on the panel so that he may have time to investigate their impartiality, determine whether to conduct appropriate voir dire examination, or to seek other relief in connection with their appointment.

Pursuant to my agreement with Mr. Kadzielski of Weissburg & Aronson, this demand signed by me is timely and effective if served upon you (or a person in charge) at the Administrator's office at the Hospital or delivered to you (or a person in charge) at your office, or telecopied to Mark Kadzielski at his office before midnight, April 30, 1987.

Sincerely,

Lawrence Silver

cc: Arthur N. Lurvey, M.D. (Hand Delivered)  
435 N. Roxbury, Suite 100  
Beverly Hills, CA 90210  
Simon J. Pinhas, M.D.  
Mark Kadzielski, Esq.

[MIDWAY HOSPITAL MEDICAL CENTER  
LETTERHEAD DELETED]

May 7, 1987

Simon Pinhas, MD  
9033 Wilshire Blvd. #206  
Beverly Hills, Ca 90211

BY: CERTIFIED MAIL  
HAND DELIVERED:  
(5/7/87)

Dear Doctor Pinhas:

This letter is in response to your request for a hearing at Midway Hospital Medical Center related to your summary suspension and the recommendation to terminate your medical staff membership. Pursuant to Article VIII, Section I.c., this hearing will be held at 6:30 p.m. on May 12, 1987 in the Pavilion Conference Room.

A Judicial Review Committee has been appointed by the Chief of Staff. Its Chairman is Ellis Berkowitz, MD, and its members are: John Hofbauer, MD; Jay Jordan, MD; Debra Judelson, MD; Alan Kessler, MD; Dwight Makoff, MD and Stephen Seiff, MD. These committee members have been advised not to discuss this matter with you or any other member of the Hospital's Medical Staff.

The decisions to summarily suspend and to terminate your membership at Midway Hospital Medical Center were based on reviews of your patient records involving ophthalmological surgeries conducted at this Hospital in 1987. These reviews concluded that your conduct of pa-

EXHIBIT "4"



tient care was below the acceptable standard of care in this Hospital.

The specific charges that support this conclusion, and the specific charts that support these charges are as follows:

# 1. JUDGMENT TO PROCEED WITH SURGERY NOT WITHIN STANDARD OF CARE IN HOSPITAL.

## A. No History and Physical on patient chart prior to surgery:

Chart #7071027	Chart #7066244
Chart #7070713	Chart #7063199
Chart #7070489	Chart #7059728
Chart #7070403	Chart #7059574
Chart #7070179	Chart #7029896/
Chart #7067615	2885069

## B. Incomplete Pre-Operative workup:

Chart #7087136	Chart #7075332
Chart #7084633	Chart #7073054
Chart #7084609	Chart #7072376
Chart #7084595	Chart #7070543
Chart #7083955	Chart #7070004
Chart #7082142	Chart #7069979
Chart #7081316	Chart #7068204
Chart #7079249	Chart #7067836
Chart #7078307	Chart #7066244
Chart #7078293	Chart #7065167
Chart #7078285	Chart #7065094
Chart #7078145	Chart #7063059
Chart #7078072	Chart #7062664
Chart #7075979	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075928	Chart #7057172
Chart #7075375	Chart #7051832

## C. Surgery contraindicated by patients' medical condition:

Chart #7087365	Chart #7070446
Chart #7087136	Chart #7068204
Chart #7084663	Chart #7065183/
Chart #7084609	2909006
Chart #7083998	Chart #7065094
Chart #7082142	Chart #7065035
Chart #7081316	Chart #7062664
Chart #7079249	Chart #7062664
Chart #7078102	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075529	Chart #7056915
Chart #7072392	Chart #7054459
Chart #7072376	Chart #7029896/
	2885069

## 2. FAILURE TO OBTAIN REQUIRED CONSENT FOR PROCEDURE PERFORMED.

### A. Lack of appropriate consent for procedure performed:

Chart #7068204	Chart #7065086/
Chart #7067674	2908727
Chart #7066244	Chart #7063318

### B. Lack of informed consent for surgery:

Chart #7085788	Chart #7078129
Chart #7084099	Chart #7075456
Chart #7081936	Chart #7072422
Chart #7081928	Chart #7068182
Chart #7079397	Chart #7068107
Chart #7079389	Chart #7065019
Chart #7078293	Chart #7062599
	Chart #7057172

## C. No IntraOcular Lens Consent:

Chart #7084692	Chart #7065086/
Chart #7084684	2908727
Chart #7083947	Chart #7063318
Chart #7082142	Chart #7062699
Chart #7079273	Chart #7062672
Chart #7072724	Chart #7062605
Chart #7070713	Chart #7062532
Chart #7070535	Chart #7059639
Chart #7067585	Chart #7057687
Chart #7066244	Chart #7057563
Chart #7065153	Chart #7057172
Chart #7065132	Chart #7029896/
	2885069

## 3. NO ASSISTANT AT SURGERY AS REQUIRED BY MEDICAL STAFF BYLAWS:

Chart #7057644	Chart #7057563
Chart #7057636	Chart #7057555
Chart #7057628	Chart #7057547

The Judicial Review Committee has been polled with regard to your requests for representation by counsel, pursuant to Article VIII., Section 2.b. You are hereby advised that the Committee has unanimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing. You are entitled, as that section indicates, to be represented by a member of the Medical Staff in good standing. If you will be represented by a staff member, please inform the undersigned of the identity of that person so that further communication regarding this matter can also be directed to that person.

A Hearing Officer, Richard Posell, Esq., has been appointed by the Governing Board. Mr. Posell is a partner in the law firm of Shapiro, Posell & Close and is experienced at conducting hearings of this type of hospi-

tals. A certified shorthand reporter has also been ordered to maintain a record of the hearing.

If you wish to review the charts in question prior to the hearing, please contact Peggy Farber RN, Director of Quality Assurance at 932-5231 or 932-5022 to make these arrangements. If copies of these records are requested, arrangements can be made with Ms. Farber after you have completed the appropriate Non-Disclosure Agreement. Copies will be handled at your own expense.

The hearing will be conducted pursuant to the provisions of Article VIII of the Midway Hospital Medical Center Medical Staff Bylaws. Those Bylaws do not provide for pre-hearing discovery of any documents or information related to the proceedings. Additionally, the Hospital does not have subpoena power or other powers to compel any one to testify at a medical staff hearing.

While the Medical Staff is not required under the Bylaws to provide you with a list of witnesses it intends to call at the hearing, the following is a list of those persons who are currently expected to testify on behalf of the Medical Staff at the hearing: Alan Friedman, MD; Arthur Lurvey, MD; Jonathan Macy, MD; James Salz, MD and Maurice Schmir, MD. The Medical Staff reserves the right to add to this list, or delete from it at any time. Please provide the undersigned with a list of your witnesses as soon as possible.

Very truly yours,

Mitchell Feldman  
Regional Vice-President

cc: Lawrence Silver, Esq.

(PROOF OF SERVICE OMITTED IN PRINTING)



[LAWRENCE SILVER A LAW CORPORATION  
LETTERHEAD DELETED]

May 8, 1987

HAND DELIVERY

Richard Posell, Esq.  
Shapiro, Posell & Close  
2029 Century Park East  
Suite 2600  
Los Angeles, CA 90067

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Posell:

We have been advised that you have been appointed by the Midway Hospital Governing Board to act as the Hearing officer in connection with the Judicial Review Committee hearing regarding the summary suspension and recommended termination of medical staff membership of Simon J. Pinhas, M.D.

In this respect, we request in order to determine whether to file a challenge to your sitting as hearing officer:

1. A full and complete recitation of any and all discussions you have had, or knowledge or information you have, with respect to this matter;

2. A full and complete recitation of any and all relationships and/or involvement you have had, prior to this matter, with Midway Hospital and/or Summit Health, Ltd.;

3. A full and complete recitation of any and all other medical peer review hearings in which you have been involved;

EXHIBIT "H"

4. A full and complete recitation of any and all business or matters referred to you by Weissburg & Aronson;

5. A full and complete recitation of any and all business or matters referred by you to Weissburg & Aronson;

6. A statement as to whether or not you were appointed as Hearing Officer in this matter by, at the behest or request of Weissburg & Aronson; and

7. The amount of compensation you will receive in connection with your appointment and functions as Hearing Officer in this matter.

8. The identification of any hospitals, or other health care providers that you or your firm represents.

9. Any reason why you might not be able to fully protect Dr. Phinas' rights or to be fair to him in the hearing of this case.

Please find enclosed a copy of Respondent's objections to Notice of Hearing dated May 7, 1987.

Sincerely,

Lawrence Silver

cc: Simon Pinhas, M.D.  
with enclosure

LS:wbr

[SHAPIRO, POSELL & CLOSE  
LETTERHEAD DELETED]

May 11, 1987

HAND DELIVERY

Lawrence Silver, Esq.  
9100 Wilshire Boulevard  
Suite 360  
Beverly Hills, CA 90212

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Silver:

I am in receipt of your letter of May 8, 1987, which was hand delivered to my office on the afternoon of May 8, 1987. As you know, my appointment as hearing officer in connection with the Judicial Review Committee hearing requested by Simon J. Pinhas, M.D. was made in accordance with the Bylaws of Midway Hospital. Those Bylaws provide, in Article VIII, Section 2d, that a hearing officer may be an attorney at law. There are no other requirements. I can assure you that I am an attorney at law licensed to practice in the state of California.

Furthermore, there is no reason why I cannot be fair to all of the parties in this matter, and I intend to be so. It would be inappropriate for me to respond further to your May 8, 1987 letter.

Very truly yours,

Shapiro, Posell & Close

Richard E. Posell

REP/hh

cc: Midway Hospital Medical Staff Office

EXHIBIT "I"

JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION FOR  
DETERMINATION AS TO THE  
BURDEN OF PROOF IN THE  
INSTANT PROCEEDING

COMES NOW Simon J. Pinhas, M.D., Respondent, by his attorneys of record, Lawrence Silver A Law Corporation, and hereby requests that the Judicial Review Committee enter an order determining the burden of proof at the hearing herein.

Respondent and his counsel in support thereof allege the following facts to be true:

1. Article VIII, Section 2j of the Midway Hospital Medical Center Medical Staff Bylaws provides:

"In all cases specified in Section 1, b. of this Article, it shall be incumbent on the person requesting the hearing to initially come forward with evidence in his support. Thereafter the burden shall shift to the body or committee whose decision prompted the hearing to come forward with evidence in support of its actions or decision."

2. Respondent demanded the present hearing upon his summary suspension of medical staff privileges, including admitting and surgical privileges, from Midway Hospital Medical Center.

3. Until May 7, 1987, Dr. Pinhas was not officially notified of the nature of charges to be presented in this proceeding, and only then was he inadequately notified.

EXHIBIT "J"



4. The Midway Hospital Medical Center Medical Staff Bylaws impose the burden of proof on respondent to initially come forward with evidence in his support. Article VIII, Section 2j of those Bylaws states:

"... After all the evidence has been submitted by both sides, the Judicial Review Committee shall rule against the person who requested the hearing unless it finds that he or she has proved by a preponderance of the evidence, that the decision that prompted the hearing was arbitrary or unreasonable, and should not be sustained by the evidence."

5. This provision creates an unfair burden on Respondent in that the Respondent is immediately obliged to prove the negative, i.e., that he did not engage in the conduct alleged.

6. The burden of proof should be on the Hospital because it is making allegations that the Respondent's conduct in connection with patient care was below the acceptable standard of care in the Hospital.

7. None of the allegations made by the Hospital/Medical Staff can be established without the calling of witnesses and Respondent should not be put to the burden of having to call witnesses to disprove something until it is actually proven by the Hospital. Only after cross-examination and the presentation of his own evidence will Respondent be able to meet the charges.

8. The principles of fair procedure and due process guaranteed to Respondent under the California and United States Constitutions cannot be so misconstrued as to condone a proposition so novel as to be inimicable to the established American standard that a party is deemed innocent until proven guilty.

WHEREFORE, it is requested that the Judicial Review Committee enter an order that the burden of proof is on the Hospital/Medical Staff and that it be the standard of "clear and convincing" evidence.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorney  
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

**RESPONDENT'S REQUEST THAT IN THE EVENT THAT HE IS DENIED THE RIGHT TO REPRESENTATION BY A PHYSICIAN-ATTORNEY AT ALL STAGES OF THE PROCEEDINGS OR BY ATTORNEY LIMITED TO CERTAIN FUNCTIONS IN THE PROCEEDING THAT ALTERNATIVELY RESPONDENT BE GRANTED THE OPPORTUNITY TO HAVE HIS ATTORNEY SIT IN THE HEARING AND ADVISE HIM WITHOUT ACTUAL PARTICIPATION IN THAT HEARING**

COMES NOW Simon J. Pinhas, M.D., Respondent, by his attorneys of record, Lawrence Silver A Law Corporation, and hereby requests that the Judicial Review Committee permit him to be represented by counsel at the hearing to the extent of permitting his attorney the opportunity to sit in the hearing and advise Respondent during the course of proceedings without actually participating in the hearing itself.

Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 30, 1987, in accordance with the Midway Medical Staff Bylaws, Respondent requested a hearing by the Judicial Review Committee. In that same letter, Respondent requested the right to be represented by a physician who is also an attorney at that hearing.

2. By letter dated May 7, 1987, Respondent was served with a Notice of Hearing in this matter and was advised that his request for representation by counsel had been denied.

3. The right to retained counsel is a crucial part to due process and fair procedure as provided to Respondent by the Federal and California Constitutions and fair procedure.

4. Failure to allow Respondent to be represented by counsel will seriously prejudice his representation and presentation of his case and will be in violation of the California and Federal Constitutions and fair procedure.

WHEREFORE, it is requested that the Judicial Review Committee permit counsel for Dr. Pinhas to sit in on the hearing and advise Respondent during the course of the proceeding without actual participation in the hearing itself.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorney  
for Simon J. Pinhas, M.D.



**JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER**

**[CAPTION DELETED]**

**RESPONDENT'S REQUEST FOR AN ORDER THAT  
IN THE EVENT THAT RESPONDENT IS DENIED  
HIS REQUEST TO BE REPRESENTED BY EITHER  
A PHYSICIAN-ATTORNEY OR AN ATTORNEY AT  
ALL STAGES OF THE PROCEEDINGS HEREIN  
THAT HE ALTERNATIVELY BE ALLOWED REP-  
RESENTATION BY AN ATTORNEY TO APPEAR IN  
THE HEARINGS TO MAKE LEGAL ARGUMENT,  
INTRODUCE EVIDENCE, AND CROSS-EXAMINE  
WITNESSES.**

COMES NOW Simon J. Pinhas, M.D., Respondent, by his attorneys of record, Lawrence Silver A Law Corporation, and hereby requests that the Judicial Review Committee permit him to be represented by counsel to the extent of appearing in the hearings to make all legal arguments to protect the record, and to produce evidence, and to cross-examine witnesses.

Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 30, 1987, in accordance with the Midway Medical Staff Bylaws, Respondent requested a hearing by the Judicial Review Committee. In that same letter, Respondent requested the right to be represented by a physician who is also an attorney at that hearing.

2. By letter dated May 7, 1987, Respondent was served with a Notice of Hearing in this matter and was advised that his request for representation by counsel had been denied.

3. The right to retained counsel is a crucial part to due process and fair procedure as provided to Respondent by the Federal and California Constitutions.

4. Failure to allow Respondent to be represented by counsel to the extent requested above will seriously prejudice his representation and presentation of his case and will be in violation of the California and Federal Constitutions.

WHEREFORE, it is requested that the Judicial Review Committee permit counsel for Respondent to participate in the hearings to the extent of making all legal arguments to protect his record, introduce evidence, and to cross-examine witnesses.

DATED: May 14, 1987

**LAWRENCE SILVER  
A LAW CORPORATION**

BY: (signature)  
Lawrence Silver, Attorney  
for Simon J. Pinhas, M.D.

**JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER**

[CAPTION DELETED]

**RESPONDENT'S MOTION FOR AN ORDER  
PERMITTING HIM TO BE REPRESENTED BY A  
PHYSICIAN WHO IS ALSO AN ATTORNEY AT ALL  
STAGES OF THE PROCEEDINGS HEREIN**

COMES NOW Simon J. Pinhas, M.D., Respondent, by his attorneys of record Lawrence Silver A Law Corporation, and hereby requests the Judicial Review Committee enter an order permitting him to be represented by a physician who is also an attorney at all stages of the proceedings herein.

Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 30, 1987, in accordance with the Midway Medical Staff Bylaws, Dr. Pinhas requested a hearing by the Judicial Review Committee. In that same letter, Dr. Pinhas requested the right to be represented by a physician who is also an attorney at that hearing.

2. By letter dated May 7, 1987, Dr. Pinhas was served with a Notice of Hearing in this matter and was advised that his request for representation by counsel had been denied.

3. The right of an affected practitioner-respondent to be entitled to be accompanied by and/or represented at the Judicial Review Committee hearing by a member of the Medical Staff in good standing is provided by the Midway Hospital Medical Staff Bylaws Article VIII, Section 2b. However, the terms of those Bylaws negate that

right if the member of the Medical Staff chosen is also an attorney.

4. The necessity of a practitioner-respondent to these proceedings to be represented by a physician-advocate is obvious given the technical medical substance of the proceedings, charts, charges, and evidence. But, equally obvious, must be the necessity of representation by counsel because a hearing of this nature of necessity involves a myriad of legal issues, with respect to which respondent-practitioner has no expertise.

5. The right of retained counsel is an essential part of fair procedure and due process as provided to Respondent by the California and Federal Constitutions.

6. The provision in Article VIII, Section 2b of the Midway Medical Center Medical Staff Bylaws with respect to the exclusion of a physician advocate who is also an attorney is unconstitutional and irrational, should be declared a nullity, and be stricken as a regulation of proceedings of this nature.

7. Failure to allow Respondent to be represented by counsel will seriously prejudice his representation and presentation of his case and will be in violation of the California and Federal Constitutions and fair procedure.



WHEREFORE, it is requested that the Judicial Review Committee enter an order permitting Dr. Pinhas the right to be represented by a physician who is an attorney at the hearing and ordering that this physician-attorney be present and argue motions on Respondent's behalf, examine and cross-examine witnesses, may be allowed to introduce evidence, and fully and completely participate in the hearing and protect the record at all stages of the proceedings herein.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorney  
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION REQUESTING THE  
JUDICIAL REVIEW COMMITTEE TO  
ARTICULATE THE FACTS AND CIRCUMSTANCES  
SURROUNDING THEIR DECISION NOT TO  
EXERCISE THEIR DISCRETION TO PERMIT  
RESPONDENT TO BE REPRESENTED BY  
COUNSEL AT THE HEARING HEREIN

COMES NOW Simon J. Pinhas, M.D., Respondent, and hereby moves the Judicial Review Committee to state the facts and circumstances surrounding their decision not to exercise their discretion to permit respondent to be represented by counsel herein, specifically to provide Respondent in writing:

1. The identity, by name, association and position, of the individual or entity who presented the issue of counsel to each member of the Judicial Review Committee;
2. The identity of the individuals that the Judicial Review Committee spoke to in connection with the decision to deny representation by counsel;
3. The reason the Judicial Review Committee denied Respondent representation by counsel;
4. A statement with respect to whether or not a Judicial Review Committee of Midway Hospital Medical Center has ever exercised their discretion to permit representation by counsel of any respondent in a Judicial Review Committee hearing, together with the reasons therefore.

Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated April 30, 1987, in accordance with the Midway Medical Staff Bylaws, Dr. Pinhas requested a hearing by the Judicial Review Committee. Dr. Pinhas by the same letter requested the right to be represented by counsel at all stages of the proceeding. (A copy of the April 30 letter is attached hereto as Exhibit "1".)
2. By letter dated May 7, 1987, a copy of the Notice of Hearing in this matter was delivered to Dr. Pinhas, and *inter alia*, Dr. Pinhas was advised that: "The Judicial Review Committee has been polled with regard to your request for representation by counsel, pursuant to Article VIII, Section 2.b. You are hereby advised that the Committee has unanimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing." (A copy of the May 7 letter is annexed hereto as Exhibit "2".)
3. The doctrines of fair procedure and due process guaranteed to Respondent by the California and United States Constitutions embody the inherent rights of representation by counsel.
4. The legal issues that are of necessity involved in a hearing of this nature are manifest. Respondent lacks the expertise that representation by counsel would provide.
5. Failure to allow Dr. Pinhas to be represented by counsel will seriously prejudice his representation or presentation of his case and will be in violation of the California and Federal Constitutions.

WHEREFORE, it is requested that the Judicial Review Committee set forth in writing its responses to the four requests made by Respondent above.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorney  
for Simon J. Pinhas, M.D.



JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

**RESPONDENT'S MOTION TO HEAR AND DECIDE  
ALL OF RESPONDENT'S PRE-HEARING MOTIONS  
AT A REASONABLE TIME PRIOR TO THE  
COMMENCEMENT OF THE HEARING HEREIN**

COMES NOW Simon J. Phinas, M.D., Respondent and hereby moves the Judicial Review Committee to hear and decide all of Respondent's pre-trial motions at a reasonable time prior to the commencement of the taking of evidence — at least one week in advance of the hearing herein.

Respondent and his counsel in support thereof allege the following facts to be true:

1. Motions *in limine* or pre-trial motions are designed to establish the procedures to be followed, and narrow and define the issues substantively to be tried, at the hearing.
2. Rulings made on these matters will affect positions to be taken, at the hearing, and will instruct and guide the preparations necessary for the presentation of evidence.
3. Therefore, as both a logical and practical matter, pre-trial motions should be heard and decided sufficiently in advance of the taking of evidence at the hearing herein.
4. The guarantees of fair procedure and the due process under the California and United States Constitutions mandate adherence to such a sequence of determination respecting pre-trial matters.

WHEREFORE, Respondent requests the Judicial Review Committee to enter a determination that it will hear and determine all of Respondent's pre-trial motions at a reasonable time prior to the commencement of the hearing herein.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorney  
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

**RESPONDENT'S MOTION FOR AN ORDER  
DIRECTING THAT ALL WITNESSES WHO ARE  
INTENDED TO BE CALLED AT THE HEARING BE  
INSTRUCTED NOT TO DISCUSS THE MATTER  
WITH ANY MEMBERS OF THE HEARING PANEL  
OR THE HEARING OFFICER**

COMES NOW Simon J. Pinhas, M.D., Respondent and hereby moves the Judicial Review Committee to order that all witnesses who are intended to be called at the hearing be instructed not to discuss the matter with any member of the hearing panel or the Hearing Officer. Respondent and his counsel in support thereof allege the following facts to be true:

1. Due process and fair procedure afforded to respondent by the United States and California Constitutions demand the opportunity for a fair hearing consisting of unbiased, unprejudiced testimony.
2. To preserve both propriety and the appearance of propriety, the record in this matter should be complete and not subject to question or surmise as to the impact any off the record discussions between officials and witnesses may have had.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order that all witnesses who are intended to be called at the hearing be instructed not

to discuss the matter with any members of the hearing panel.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorney  
for Simon J. Pinhas, M.D.



**JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER**

**[CAPTION DELETED]**

**RESPONDENT'S MOTION REQUESTING THAT  
ALL REPORTS OF EXPERT WITNESSES TO BE  
CALLED BY THE HOSPITAL BE SUBMITTED TO  
RESPONDENT NO LESS THAN 10 DAYS PRIOR TO  
THEIR BEING CALLED AS WITNESSES**

COMES NOW Simon J. Pinhas, M.D., Respondent and hereby moves the Judicial Review Committee to enter an order that all reports of expert witnesses to be called by the Hospital be submitted to him no less than ten (10) days prior to the date they are to be called as witnesses and ordering that the Hospital be precluded from calling any expert witness if such report is not made available.

Respondent and his counsel in support thereof allege the following facts to be true:

1. Expert testimony, as a general rule, is opinion testimony with respect to subject matter that is beyond the ken of the average trier of fact. Despite the expert's lack of the first-hand knowledge of a percipient witness to the event in question, the normal antecedent requirement for the admission of testimony, expert opinion testimony is deemed admissible because it is viewed as useful and beneficial to the trier of fact.

2. Expert testimony, thus, is innately more complex and demanding than ordinary evidence.

3. It is therefore axiomatic that more time is needed to ascertain, analyze and understand the substance and significance of such testimony in order that a party can adequately prepare to address such testimony.

4. Respondent is entitled to the adoption of this procedure by the Judicial Review Committee in order to effectuate his right to fair procedure and due process under the California and United States Constitution.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order directing that all reports of expert witnesses to be called by the Hospital be submitted to Respondent no less than 10 days prior to their being called as witnesses and that the Hospital be precluded from calling any expert witness if such report is not made available.

DATED: May 14, 1987

**LAWRENCE SILVER  
A LAW CORPORATION**

BY: (signature)  
Lawrence Silver, Attorney  
for Simon J. Pinhas, M.D.

**JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER**

[CAPTION DELETED]

**RESPONDENT'S MOTION REQUESTING A LIST  
OF  
ALL WITNESSES TO ANY OF THE EVENTS  
INVOLVING CHARGES HEREIN; A LIST OF  
ALL WITNESSES MIDWAY HOSPITAL INTENDS  
TO CALL HEREIN; A WRITTEN  
SUMMARY OF THE DIRECT TESTIMONY OF ALL  
WITNESSES TO BE CALLED; AND THE  
OPPORTUNITY TO INTERVIEW ALL WITNESSES  
WHO MAY BE CALLED AGAINST RESPONDENT**

COMES NOW Simon J. Pinhas, M.D., Respondent, and hereby moves the Judicial Review Committee to enter an order requiring Midway Hospital Medical Center ("Midway") to provide:

1. A list of all witnesses to any of the events involving the charges, whether or not they are intended to be called at the time of the hearing herein;
2. A list of all witnesses that the Hospital intends to call at the time of the hearing;
3. A written summary of the direct testimony of all witnesses who will be called in the proceedings against Respondent;

And also ordering the Respondent be allowed the opportunity to interview all witnesses that may be called as witnesses against him herein.

Respondent and his counsel in support thereof allege the following facts to be true:

1. The hearing in this matter should be devoted exclusively to evidence which is material, relevant and competent.

2. The preparation by the parties herein should therefore be directed at securing and focusing on, only those witnesses and that testimony which will comport with such well-established evidentiary standards.

3. Determining in advance which witnesses will and should be called, and the nature and substance of their testimony, will narrow and delimit the preparation for, and the direct and cross-examination of, those witnesses.

4. This process of discovery will shorten the time in which witnesses need to appear on direct examination and ultimately serve the interest of economy of time and effort to be expended by all parties and officials at the hearing.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order requiring that:

1. Midway Hospital produce a list of all witnesses to any of the events involving the charges whether or not they are intended to be called at the time of the hearing;
2. Produce a list of all witnesses who Midway intends to call at the time of the hearing;
3. A written summary of the direct testimony of all witnesses who will be called in the proceedings against Respondent;



4. And further ordering that Respondent be granted the opportunity to interview all witnesses who may be called as witnesses against him in the proceedings herein.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorneys  
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

**MOTION REQUESTING THAT ALL ADVICE AND INSTRUCTIONS GIVEN BY THE HEARING OFFICER TO THE COMMITTEE ON ANY ISSUE WITH RESPECT TO OR AT THE HEARING BE RECORDED; AND REQUESTING THAT THE HEARING OFFICER BE EXCLUDED FROM DELIBERATIONS AT THE CLOSE OF EVIDENCE**

COMES NOW Respondent Simon J. Pinhas, M.D., by his attorneys and hereby requests that the Hearing Officer be excused from the deliberations of the Hearing Committee or, in the alternative, that the advice and instructions given by the Hearing Officer be recorded and in support thereof alleges:

1. The Committee will commence its deliberations upon the close of the evidence.
2. The Hearing Officer was appointed to allow the orderly presentation of evidence and to provide other legal advice, and any advice or instructions given by the Hearing Officer should be duly recorded.
3. The Midway Medical Staff Bylaws provide that the Hearing Officer is not allowed or permitted to cast a vote during the Committee's deliberations.
4. The Hearing Officer has no real role or function to perform during Committee deliberations. The roles of judge, (Hearing Officer), and jury (the Committee) should be carefully preserved and meticulously respected to foster the attitude and atmosphere of impartiality that must be accorded to respondent under the principles of

due process and fair procedure which are guaranteed by the United States and California Constitution.

5. Respondent requests that to serve these interests the Hearing Officer should be excluded from Committee deliberations.

6. In the event that the Hearing Officer's not excluded from Committee deliberations, any advice or instructions he may give to the committee during those deliberations should be duly recorded.

WHEREFORE, it is respectfully requested that the Judicial Review Committee order that any participation by the Hearing Officer on any issue with respect to or at the Hearing be recorded by the court reporter, and further order that the Hearing Officer be excluded from the deliberations of the Committee at the close of evidence herein; or alternately ordering that any advice or instructions given by the Hearing Officer during Committee deliberations to be duly recorded.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorneys  
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S REQUEST FOR  
PERMISSION TO APPEAR WITH  
COUNSEL

COMES NOW Simon J. Pinhas, M.D., respondent, by his attorneys of record, Lawrence Silver A Law Corporation, and hereby requests that the Judicial Review Committee permit him to be represented by counsel in connection with all pre-hearing proceedings in this matter and at the Judicial Review Committee Hearing commencing on May 26, 1987. Respondent and his counsel in support thereof allege the following facts to be true:

1. By letter dated May 7, 1987, Midway Hospital Medical Center ("Midway") advised Respondent that his request for representation by counsel had been denied in connection with the hearing with respect to respondent's summary suspension of all medical staff, including admitting and surgical, privileges.

2. Article VIII, Section 2 (b) of the Midway Medical Staff Bylaws provides for representation by counsel at the Judicial Review Committee Hearing only if the Judicial Review Committee, in its discretion, permits both sides to be represented. Respondent does not object to the Hospital being represented at the hearing.

3. To the extent that the Judicial Review Committee has discretion to appoint counsel, respondent requests that the Judicial Review Committee exercise it.

4. Respondent requests representation of counsel at all stages of this hearing, including the pre-hearing stage where all motions will be argued. Since Article VIII,

Sections 2(g) and (i) provide the right to submit written argument, argument of counsel should be permitted to be heard in support of these briefs.

5. Respondent requests representation by counsel because of the many legal issues that are of necessity involved in the hearing of this nature. Respondent has no training, understanding, or ability with respect to: (a) reading and interpreting the Bylaws; (b) selection of members of the Committee; (c) challenging a member of the Committee for bias or prejudice; (d) challenging the hearing officer for bias or prejudice; (e) interpreting the burden of proof; (f) evaluating the admissibility of evidence; (g) objecting to testimony that is offered; (h) preserving the record; (i) making legal arguments; (j) and marshalling arguments in a persuasive way.

6. In addition, cross-examination of witnesses requires great legal skill and courtroom experience. It is anticipated that it will be necessary to cross-examine witnesses to show bias, motive, bad acts, and inconsistent statements. Respondent does not possess the legal skills necessary to accomplish this task.

7. The right to retained counsel is an essential part of fair procedure and due process as provided to Respondent by the California and Federal Constitutions.

8. Failure to allow Respondent to be represented by counsel will seriously prejudice his representation and presentation of this case and will be in violation of the California and Federal Constitutions and fair procedure.

WHEREFORE, it is requested that the Judicial Review Committee permit counsel for Dr. Pinhas to participate on respondent's behalf at all stages of the hearing.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

By: \_\_\_\_\_ (signature)

Lawrence Silver, Attorneys  
for Simon J. Pinhas, M.D.



JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

**MOTION FOR FULL DISCLOSURE OF ALL  
CHARGES AGAINST RESPONDENT WITH SUFFI-  
CIENT PARTICULARITY TO PERMIT THE PREPA-  
RATION OF AN ADEQUATE DEFENSE HEREIN**

COMES NOW Respondent Simon J. Pinhas, M.D., seeking full disclosure of all charges against him with sufficient particularity that he may investigate and rebut those charges. Respondent and his counsel in support thereof allege the following facts to be true:

1. On May 7, 1987, Midway Hospital Medical Center ("Midway") gave notice of the hearing herein and purported to afford Respondent notice of the charges against him. (A copy of the Notice of Hearing ["the Notice"] is annexed hereto as Exhibit "1".)

2. The Notice sets forth what it terms "specific charges", but the charges are rendered in broad, general language, and reference nearly 128 charts which are cited as support for those charges. The charges and charts, even when studied together, do not offer sufficient detail with which Respondent can adequately prepare a defense.

3. In order to investigate and rebut Midway's charges, Respondent must be able to determine in what particular respect each of the charts allegedly support the charges as proffered by Midway. General allegations, followed by a collocation of chart numbers, do not satisfy this requirement.

4. Moreover, Midway's Notice identifies at least five (5) witnesses, but does not state which charges and/or

charts will be addressed by the testimony of each of those witnesses.

5. Respondent is thus left without sufficient disclosure to determine intelligently and efficiently what any one witness in fact actually knows about a particular charge or a particular chart.

6. As a result, Respondent's ability to prepare for examination of these witnesses is significantly impaired.

7. The dictates of fair procedure and due process guaranteed to Respondent under the California and United States Constitution mandate more complete disclosure with greater particularity than that accorded to Respondent herein.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order requiring Midway Hospital Medical Center to provide full disclosure of all charges against Respondent with sufficient particularity to permit the preparation of an adequate defense herein.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: \_\_\_\_\_ (signature)  
Lawrence Silver, Attorneys  
for Simon J. Pinhas, M.D.

[MIDWAY HOSPITAL MEDICAL CENTER  
LETTERHEAD DELETED]

May 7, 1987

Simon Pinhas, MD  
9033 Wilshire Blvd. #206  
Beverly Hills, CA 90211

BY: CERTIFIED MAIL  
HAND DELIVERED:  
(5/7/87)

Dear Doctor Pinhas:

This letter is in response to your request for a hearing at Midway Hospital Medical Center related to your summary suspension and the recommendation to terminate your medical staff membership. Pursuant to Article VIII, Section I.e., this hearing will be held at 6:30 p.m. on May 12, 1987 in the Pavilion Conference Room.

A Judicial Review Committee has been appointed by the Chief of Staff. Its Chairman is Ellis Berkowitz, MD, and its members are: John Hofbauer, MD; Jay Jordan, MD; Debra Judelson, MD; Alan Kessler, MD; Dwight Makoff, MD and Stephen Seiff, MD. These committee members have been advised not to discuss this matter with you or any other member of the Hospital's Medical Staff.

The decisions to summarily suspend and to terminate your membership at Midway Hospital Medical Center were based on reviews of your patient records involving ophthalmological surgeries conducted at this Hospital in 1987. These reviews concluded that your conduct of pa-

EXHIBIT "1"

tient care was below the acceptable standard of care in this Hospital.

The specific charges that support this conclusion, and the specific charts that support these charges are as follows:

1. JUDGMENT TO PROCEED WITH SURGERY  
NOT WITHIN STANDARD OF CARE IN HOSPITAL.

A. No History and Physical on patient chart prior to surgery:

Chart #7071027	Chart #7066244
Chart #7070713	Chart #7063199
Chart #7070489	Chart #7059728
Chart #7070403	
Chart #7070179	Chart #7029896/
Chart #7067615	2885069

B. Incomplete Pre-Operative workup:

Chart #7087136	Chart #7075332
Chart #7084633	Chart #7073054
Chart #7084609	Chart #7072376
Chart #7084595	Chart #7070543
Chart #7083955	Chart #7070004
Chart #7082142	Chart #7069979
Chart #7081316	Chart #7068204
Chart #7079249	Chart #7067836
Chart #7078307	Chart #7066244
Chart #7078293	Chart #7065167
Chart #7078285	Chart #7065094
Chart #7078145	Chart #7063059
Chart #7078072	Chart #7062664
Chart #7075979	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075928	Chart #7057172
Chart #7075375	Chart #7051832



C. Surgery contraindicated by patients' medical condition:

Chart #7087365	Chart #7070446
Chart #7087136	Chart #7068204
Chart #7084663	Chart #7065183/
Chart #7084609	2909006
Chart #7083998	Chart #7065094
Chart #7082142	Chart #7065035
Chart #7081316	Chart #7062664
Chart #7079249	Chart #7062664
Chart #7078102	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075529	Chart #7056915
Chart #7072392	Chart #7054459
Chart #7072376	Chart #7029896/
	2885069

2. FAILURE TO OBTAIN REQUIRED CONSENT FOR PROCEDURE PERFORMED.

A. Lack of appropriate consent for procedure performed:

Chart #7068204	Chart #7065086/
Chart #7067674	2908727
Chart #7066244	Chart #7063318

B. Lack of informed consent for surgery:

Chart #7085788	Chart #7078129
Chart #7084099	Chart #7075456
Chart #7081936	Chart #7072422
Chart #7081928	Chart #7068182
Chart #7079397	Chart #7068107
Chart #7079389	Chart #7065019
Chart #7078293	Chart #7062699
	Chart #7057172

C. No IntraOcular Lens Consent:

Chart #7084692	Chart #7063086/
Chart #7084684	08727
Chart #7083947	Chart #7063318
Chart #7082142	Chart #7062699
Chart #7079273	Chart #7062672
Chart #7072724	Chart #7062605
Chart #7070713	Chart #7062532
Chart #7070535	Chart #7059639
Chart #7067585	Chart #7057687
Chart #7066244	Chart #7057563
Chart #7065153	Chart #7057172
Chart #7065132	Chart #7029896/
	2885069

3. NO ASSISTANT AT SURGERY AS REQUIRED BY MEDICAL STAFF BYLAWS:

Chart #7057644	Chart #7057563
Chart #7057636	Chart #7057555
Chart #7057628	Chart #7057547

The Judicial Review Committee has been polled with regard to your requests for representation by counsel, pursuant to Article VIII., Section 2.b. You are hereby advised that the Committee has unanimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing. You are entitled, as that section indicates, to be represented by a member of the Medical Staff in good standing. If you will be represented by a staff member, please inform the undersigned of the identity of that person so that further communication regarding this matter can also be directed to that person.

A Hearing Officer, Richard Posell, Esq., has been appointed by the Governing Board. Mr. Posell is a part-



ner in the law firm of Shapiro, Posell & Close and is experienced at conducting hearings of this type at hospitals. A certified shorthand reporter has also been ordered to maintain a record of the hearing.

If you wish to review the charts in question prior to the hearing, please contact Peggy Farber RN, Director of Quality Assurance at 932-5231 or 932-5022 to make these arrangements. If copies of these records are requested, arrangements can be made with Ms. Farber after you have completed the appropriate Non-Disclosure Agreement. Copies will be handled at your own expense.

The hearing will be conducted pursuant to the provisions of Article VIII of the Midway Hospital Medical Center Medical Staff Bylaws. Those Bylaws do not provide for pre-hearing discovery of any documents or information related to the proceedings. Additionally, the Hospital does not have subpoena power or other powers to compel any one to testify at a medical staff hearing.

While the Medical Staff is not required under the Bylaws to provide you with a list of witnesses it intends to call at the hearing, the following is a list of those persons who are currently expected to testify on behalf of the Medical Staff at the hearing: Alan Friedman, MD; Arthur Lurvey, MD; Jonathan Macy, MD; James Salz, MD and Maurice Schmir, MD. The Medical Staff reserves the right to add to this list, or delete from it at any time. Please provide the undersigned with a list of your witnesses as soon as possible.

Very truly yours,

Mitchell Feldman  
Regional Vice-President

cc: Lawrence Silver, Esq.

# JUDICIAL REVIEW COMMITTEE OF MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

## RESPONDENT'S MOTION TO EXCLUDE FROM TESTIMONY ANY WITNESS WHO WILL NOT SUB- MIT TO AN INTERVIEW BY RESPONDENT AND HIS COUNSEL

COMES NOW, Simon J. Pinhas, M.D., Respondent, and hereby moves the Judicial Review Committee to exclude from testimony any witness who will not submit to an interview by Respondent and his counsel, and in support thereof alleges the following facts to be true:

1. On May 7, 1987, Respondent received a letter from Midway Hospital and Medical Center ("Midway"). It was stated that at least 5 witnesses would be called to testify on behalf of the Medical Staff at the hearings now scheduled for May 26, 1987.
2. Respondent believes and alleges that all 5 witnesses are either employed by Midway or are holders of staff privileges accorded by Midway.
3. In order to prepare for the hearing in which Midway seeks to terminate his staff privileges, it is necessary for Respondent to know what these witnesses will say about his conduct.
4. Respondent has never had the opportunity to interview these 5 witnesses.
5. None of these witnesses have ever previously testified against Respondent. Because Respondent was not represented by counsel he was unable to adequately cross-examine even these witnesses.

6. Midway can compel these witnesses to be interviewed by Respondent and his counsel pursuant to the Bylaws which require every member of the Medical Staff to insure fair procedure to all other members. Fairness would dictate that witnesses so closely connected to one party not be permitted to testify unless Respondent has an opportunity to interview each of them.

7. The right to a fair hearing involves the right to confront and cross-examine opposing witnesses. A necessary corollary of this basic right is the right to interview witnesses to learn what they will say.

8. The California Constitution as well as the U.S. Constitution and the Midway Medical Staff bylaws guarantee Respondent a fair hearing.

WHEREFORE it is requested that the Judicial Review Committee issue an order that no witness be permitted to testify on behalf of the Medical Staff at the Judicial Review Committee hearing unless they submit to an interview by Respondent and his counsel.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorneys  
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

RESPONDENT'S MOTION REQUESTING DOCUMENTS FOR THE PURPOSES OF EXAMINATION, REVIEW, AND DUPLICATION

COMES NOW Simon J. Pinhas, M.D., Respondent and hereby moves for the Judicial Review Committee to order the production to Respondent for purposes of examination and duplication at a time reasonably prior to the hearing in this matter of the following documents:

1. The originals of all charts in their full, complete, and unaltered state, which have been used or considered in connection with the bringing of charges against Respondent;

2. The Minutes of any meeting of any members of the staff of Midway Hospital Medical Center ("Midway") or its Medical Staff in connection with considering to bring and the bringing of any charges against Respondent;

3. All writings, as the term is defined by Section 250 of the California Evidence Code, and all copies which in any way are different therefrom, regarding any communication respecting Respondent's medical staff privileges or his performance as a physician at Midway;

4. All writings which are exculpatory to any charges or any sanction which might be sought to be imposed;

5. All communications with the Department of Health Services or any governmental agency regarding Respondent's practice of medicine; and all contracts between Midway or Summit Health, Ltd., or any affiliates, parents, or subsidiaries thereof, with any member of the Medical Staff for purposes of determining bias, interest, or for



purposes of impeachment or any other appropriate evidentiary purpose.

WHEREFORE, it is requested that the Judicial Review Committee issue an order directing the production for purposes of Respondent's examination and duplication, at a reasonable time before the hearing herein, of the documents listed as items 1 through 5, inclusive above.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

By: (Signature)  
Lawrence Silver, Attorneys  
for Simon J. Pinhas, M.D.

JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

**RESPONDENT'S MOTION REQUESTING AN  
ORDER COMPELLING THE HEARING OFFICER  
ATTORNEY POSELL TO ANSWER RESPONDENT'S  
REQUESTS FOR INFORMATION, OR,  
ALTERNATIVELY, DISQUALIFYING THE  
HEARING OFFICER AND APPOINTING A  
RETIRED JUDGE OF THE SUPREME COURT OR  
A HEARING OFFICER OF UNQUESTIONABLE  
IMPARTIALITY**

COMES NOW Simon J. Pinhas, M.D., Respondent, and hereby moves for the Judicial Review Committee to rule and direct that the Hearing Officer in this matter, Richard E. Posell, a partner in the law firm of Shapiro, Posell & Close, respond in full to Respondent's requests for information, or be disqualified from presiding at the hearing herein. Respondent and his counsel in support thereof allege the following facts to be true:

1. On May 7, 1987, Respondent was informed by letter that Mr. Richard Posell, Esq., had been appointed by the governing board as hearing officer herein, Exhibit "A" attached hereto.

2. By letter dated May 8, 1987, which was hand-delivered to Mr. Posell at his offices at Shapiro, Posell & Close, Respondent, in order to determine whether to file a challenge to Mr. Posell's sitting as hearing officer, requested that Mr. Posell provide Respondent with certain information, Exhibit "B" attached hereto.



3. Respondent requested:

a. A full and complete recitation of any and all discussions Mr. Posell has had, or knowledge or information Mr. Posell has, with respect to this matter;

b. A full and complete recitation of any and all relationships and/or involvement Mr. Posell has had, prior to this matter, with Midway Hospital and/or Summit Health Ltd.;

c. A full and complete recitation of any and all other medical peer review hearings in which Mr. Posell has been involved;

d. A full and complete recitation of any and all business or matters referred to Mr. Posell by Weissburg & Aronson [Summit Health Ltd.'s counsel];

e. A full and complete recitation of any and all business or matters referred by Mr. Posell to Weissburg & Aronson;

f. A statement as to whether or not Mr. Posell was appointed as Hearing Officer in this matter by, at the behest or request of Weissburg & Aronson;

g. The amount of compensation Mr. Posell will receive in connection with his appointment and functions as Hearing Officer in this matter;

h. The identification of any hospitals, or other health care providers that Mr. Posell or his law firm represents; and

i. Any reason why Mr. Posell might not be able to fully protect Respondent's rights or be fair to Respondent in the hearing of this matter.

4. By letter, dated May 11, 1987, Mr. Posell stated that his appointment as hearing officer in this matter was made in accordance with the Bylaws of Midway Hospital, which provide in Article VIII, Section 2d, that a hearing officer may be an attorney at law. Mr. Posell stated that he was indeed an attorney at law licensed to practice in the State of California. Mr. Posell went on to say that there was no reason why he could not be fair to all of the parties in this matter, and that he intends to be so. Finally, Mr. Posell concluded his letter by stating that it would be inappropriate for him to respond further to Respondent's May 8, 1987 letter, attached hereto as Exhibit "C".

5. The response provided by Mr. Posell is clearly inadequate.

6. The information requested by Respondent is essential in order for him to investigate Mr. Posell's impartiality and determine whether to file a challenge to the appointment of Mr. Posell as hearing officer in this matter.

7. Fair opportunity to be heard as guaranteed to Respondent by the Constitutions of California and the United States and fair procedure requires at the very minimum a neutral and detached hearing officer whose impartiality may not be questioned.

8. In the event the Judicial Review Committee decides not to enter an order compelling Mr. Posell to answer Respondent's requests for information, or does so enter the order requested and Mr. Posell refuses to respond or responds incompletely, Respondent asks the Judicial Review Committee to enter an order disqualifying Mr. Posell and appointing in his stead a retired Judge of the Supe-

rior Court or a hearing officer of similar unquestionable impartiality.

WHEREFORE, Respondent requests that the Judicial Review Committee enter an order compelling hearing officer, Richard E. Posell, to answer Respondent's request for information set forth above in paragraph 3, subparagraphs a through i, inclusive; or alternatively, enter an order disqualifying Mr. Posell and appointing a retired judge of the Superior Court or a hearing officer of similar unquestionable impartiality.

DATED: May 14, 1987

LAWRENCE SILVER  
A LAW CORPORATION

BY: (signature)  
Lawrence Silver, Attorneys  
for Simon J. Pinhas, M.D.

[MIDWAY HOSPITAL MEDICAL CENTER  
LETTERHEAD DELETED]

May 7, 1987

Simon Pinhas, MD  
9033 Wilshire Blvd. # 206  
Beverly Hills, CA 90211

BY: CERTIFIED MAIL  
HAND DELIVERED:  
(5/7/87)

Dear Doctor Pinhas:

This letter is in response to your request for a hearing at Midway Hospital Medical Center related to your summary suspension and the recommendation to terminate your medical staff membership. Pursuant to Article VIII, Section I.e., this hearing will be held at 6:30 p.m. on May 12, 1987 in the Pavilion Conference Room.

A Judicial Review Committee has been appointed by the Chief of Staff. Its Chairman is Ellis Berkowitz, MD, and its members are: John Hofbauer, MD; Jay Jordan, MD; Debra Judelson, MD; Alan Kessler, MD; Dwight Makoff, MD and Stephen Seiff, MD. These committee members have been advised not to discuss this matter with you or any other member of the Hospital's Medical Staff.

The decisions to summarily suspend and to terminate your membership at Midway Hospital Medical Center were based on reviews of your patient records involving ophthalmological surgeries conducted at this Hospital in 1987. These reviews concluded that your conduct of pa-

EXHIBIT "A"

tient care was below the acceptable standard of care in this Hospital.

The specific charges that support this conclusion, and the specific charts that support these charges are as follows:

**1. JUDGMENT TO PROCEED WITH SURGERY NOT WITHIN STANDARD OF CARE IN HOSPITAL.**

**A. No History and Physical on patient chart prior to surgery:**

Chart #7071027	Chart #7066244
Chart #7070713	Chart #7063199
Chart #7070489	Chart #7059728
Chart #7070403	Chart #7059574
Chart #7070179	Chart #7029896/
Chart #7067615	2885069

**B. Incomplete Pre-Operative workup:**

Chart #7087136	Chart #7075332
Chart #7084633	Chart #7073054
Chart #7084609	Chart #7072376
Chart #7084595	Chart #7070543
Chart #7083955	Chart #7070004
Chart #7082142	Chart #7069979
Chart #7081316	Chart #7068204
Chart #7079249	Chart #7067836
Chart #7078307	Chart #7066244
Chart #7078293	Chart #7065167
Chart #7078285	Chart #7065094
Chart #7078145	Chart #7063059
Chart #7078072	Chart #7062664
Chart #7075979	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075928	Chart #7057172
Chart #7075375	Chart #7051832

**C. Surgery contraindicated by patients' medical condition:**

Chart #7087365	Chart #7070446
Chart #7087136	Chart #7068204
Chart #7084663	Chart #7065183/
Chart #7084609	2909006
Chart #7083998	Chart #7065094
Chart #7082142	Chart #7065035
Chart #7081316	Chart #7062664
Chart #7079249	Chart #7062664
Chart #7078102	Chart #7059639
Chart #7075936	Chart #7059612
Chart #7075529	Chart #7056915
Chart #7072392	Chart #7054459
Chart #7072376	Chart #7029896/
	2885069

**2. FAILURE TO OBTAIN REQUIRED CONSENT FOR PROCEDURE PERFORMED.**

**A. Lack of appropriate consent for procedure performed:**

Chart #7068204	Chart #7065086/
Chart #7067674	2908727
Chart #7066244	Chart #7063318

**B. Lack of informed consent for surgery:**

Chart #7085788	Chart #7078129
Chart #7084099	Chart #7075456
Chart #7081936	Chart #7072422
Chart #7081928	Chart #7068182
Chart #7079397	Chart #7068107
Chart #7079389	Chart #7065019
Chart #7078293	Chart #7062699
	Chart #7057172



## C. No IntraOcular Lens Consent:

Chart #7084692	Chart #7063086/
Chart #7084684	2908727
Chart #7083947	Chart #7063318
Chart #7082142	Chart #7062699
Chart #7079273	Chart #7062672
Chart #7072724	Chart #7062605
Chart #7070713	Chart #7062532
Chart #7070535	Chart #7059639
Chart #7067585	Chart #7057687
Chart #7066244	Chart #7057563
Chart #7065153	Chart #7057172
Chart #7065132	Chart #7029896/
	2885069

## 3. NO ASSISTANT AT SURGERY AS REQUIRED BY MEDICAL STAFF BYLAWS:

Chart #7057644	Chart #7057563
Chart #7057636	Chart #7057555
Chart #7057628	Chart #7057547

The Judicial Review Committee has been polled with regard to your requests for representation by counsel, pursuant to Article VIII., Section 2.b. You are hereby advised that the Committee has unanimously voted not to permit either you or the Medical Staff to be represented by an attorney at law at the hearing. You are entitled, as that section indicates, to be represented by a member of the Medical Staff in good standing. If you will be represented by a staff member, please inform the undersigned of the identity of that person so that further communication regarding this matter can also be directed to that person.

A Hearing Officer, Richard Posell, Esq., has been appointed by the Governing Board. Mr. Posell is a part-

ner in the law firm of Shapiro, Posell & Close and is experienced at conducting hearings of this type at hospitals. A certified shorthand reporter has also been ordered to maintain a record of the hearing.

If you wish to review the charts in question prior to the hearing, please contact Peggy Farber RN, Director of Quality Assurance at 932-5231 or 932-5022 to make these arrangements. If copies of these records are requested, arrangements can be made with Ms. Farber after you have completed the appropriate Non-Disclosure Agreement. Copies will be handled at your own expense.

The hearing will be conducted pursuant to the provisions of Article VIII of the Midway Hospital Medical Center Medical Staff Bylaws. Those Bylaws do not provide for pre-hearing discovery of any documents or information related to the proceedings. Additionally, the Hospital does not have subpoena power or other powers to compel any one to testify at a medical staff hearing.

While the Medical Staff is not required under the Bylaws to provide you with a list of witnesses it intends to call at the hearing, the following is a list of those persons who are currently expected to testify on behalf of the Medical Staff at the hearing: Alan Friedman, MD; Arthur Lurvey, MD; Jonathan Macy, MD; James Salz, MD and Maurice Schmir, MD. The Medical Staff reserves the right to add to this list, or delete from it at any time.

Please provide the undersigned with a list of your witnesses as soon as possible.

Very truly yours,

Mitchell Feldman  
Regional Vice-President

cc: Lawrence Silver, Esq.

[LAWRENCE SILVER A LAW CORPORATION  
LETTERHEAD DELETED]

May 8, 1987

Richard Posell, Esq.  
Shapiro, Posell & Close  
2029 Century Park East  
Suite 2600  
Los Angeles, CA 90067

HAND DELIVERY

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Posell:

We have been advised that you have been appointed by the Midway Hospital Governing Board to act as the Hearing officer in connection with the Judicial Review Committee hearing regarding the summary suspension and recommended termination of medical staff membership of Simon J. Pinhas, M.D.

In this respect, we request in order to determine whether to file a challenge to your sitting as hearing officer:

1. A full and complete recitation of any and all discussions you have had, or knowledge or information you have, with respect to this matter;

2. A full and complete recitation of any and all relationships and/or involvement you have had, prior to this matter, with Midway Hospital and/or Summit Health, Ltd.;

EXHIBIT "B"

3. A full and complete recitation of any and all other medical peer review hearings in which you have been involved;

4. A full and complete recitation of any and all business or matters referred to you by Weissburg & Aronson;

5. A full and complete recitation of any and all business or matters referred by you to Weissburg & Aronson;

6. A statement as to whether or not you were appointed as Hearing Officer in this matter by, at the behest or request of Weissburg & Aronson; and

7. The amount of compensation you will receive in connection with your appointment and functions as Hearing Officer in this matter.

8. The identification of any hospitals, or other health care providers that you or your firm represents.

9. Any reason why you might not be able to fully protect Dr. Pinhas' rights or be fair to him in the hearing of this case.

Please find enclosed a copy of Respondent's objections to Notice of Hearing dated May 7, 1987.

Sincerely,

Lawrence Silver

cc: Simon Pinhas, M. D.  
with enclosure

LS: wbr

[SHAPIRO, POSELL & CLOSE LETTERHEAD  
DELETED]

May 11, 1987

HAND DELIVERY

Lawrence Silver, Esq.  
9100 Wilshire Boulevard  
Suite 360  
Beverly Hills, CA 90212

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Silver:

I am in receipt of your letter of May 8, 1987, which was hand delivered to my office on the afternoon of May 8, 1987. As you know, my appointment as hearing officer in connection with the Judicial Review Committee hearing requested by Simon J. Pinhas, M.D. was made in accordance with the Bylaws of Midway Hospital. Those Bylaws provide, in Article VIII, Section 2d, that a hearing officer may be an attorney at law. There are no other requirements. I can assure you that I am an attorney at law licensed to practice in the state of California.

Furthermore, there is no reason why I cannot be fair to all of the parties in this matter, and I intend to be so. It would be inappropriate for me to respond further to your May 8, 1987 letter.

Very truly yours,

SHAPIRO, POSELL & CLOSE

Richard E. Posell

REP/hh

cc: Midway Hospital Medical Staff Office

EXHIBIT "C"



[SHAPIRO, POSELL & CLOSE LETTERHEAD  
DELETED]

May 18, 1987

Lawrence Silver, Esq.  
9100 Wilshire Boulevard  
Suite 260  
Beverly Hills, CA 90212

Re: Simon J. Pinhas, M.D.

Dear Mr. Silver:

On May 7, 1987 Dr. Pinhas was advised that the Judicial Review Committee had unanimously voted not to permit either Dr. Pinhas or the medical staff to be represented by an attorney at law at the hearing. Notwithstanding that determination, you have continued to barrage this office with motions and requests on behalf of your client.

Neither the hearing officer nor the Judicial Review Committee may consider motions or requests made "in any phase of the hearing or appeal procedure by an attorney at law unless the hearing committee, in its discretion, permits both sides to be represented by legal counsel" (Bylaw Article VIII, Section 2(b)). Your continued participation is a violation of the foregoing Bylaw. Please refrain from filing and serving further documents in this matter.

Very truly yours,

Richard E. Posell

REP/hh

cc: Mark Kadzielski, Esq.  
Midway Hospital Medical Staff

**EXHIBIT "K"**

[LAWRENCE SILVER A LAW CORPORATION  
LETTERHEAD DELETED]

May 19, 1987

VIA TELECOPIER AND MAIL

Richard Posell, Esq.  
Shapiro, Posell & Close  
2029 Century Park East  
Suite 2600  
Los Angeles, CA 90067

Re: Matter of Simon J. Pinhas, M.D.

Dear Mr. Posell:

In the years that I represented hospitals in medical staff matters and in the years that I have represented physicians regarding medical staff privileges, no one has ever suggested, much less ruled, that the attorney cannot advise and act on behalf of the physician except during the actual hearing itself. Your ruling is a first. This ruling further supports the reasons why I believe you should be disqualified from continuing as the hearing officer in this case. You are not impartial as you were and are required to be.

I request that you answer the following questions:

1. Did you and Mr. Kadzielski of Weissburg & Aronson, and/or counsel to Summit Corporation and Midway Hospital discuss my motions before you signed the letter dated May 18, 1987? If so, would you disclose the entire content of those conversation(s).

2. Are you striking all of the motions I made on Dr. Pinhas' behalf?

**EXHIBIT "L"**

3. Are you precluding me from further representing Dr. Pinhas in the proceedings at the Hospital?

Sincerely,

Lawrence Silver

cc: Mark Kadzielski  
Simon J. Pinhas, M.D.

[SHAPIRO, POSELL & CLOSE LETTERHEAD  
DELETED]

May 21, 1987

Simon J. Pinhas, M.D.  
9033 Wilshire Boulevard  
Suite 206  
Beverly Hills, CA 90211

Re: The Matter of Simon J. Pinhas,  
M.D./Judicial Review Committee of Mid-  
way Hospital Medical Center

Dear Dr. Pinhas:

I am in receipt of 15 motions and requests made by you in connection with the above hearing now scheduled for May 26, 1987. Although these motions and requests are virtually identical to those which were served upon me on the letterhead of your attorney, and although it is clear from the bylaws that you may not be "represented in any phase of the hearing . . . procedure by an attorney at law unless the hearing committee in its discretion, permits" it (which it has not done), I have elected to rule on several of the motions and requests as follows:

1. Respondent's Request for Permission to Appear with Counsel.

The Judicial Review Committee has exercised its discretion not to permit either side to be represented by counsel. This motion is denied.

2. Respondent's Motion Requesting a List of All Witnesses to Any of the Events Involving Charges Herein: A List of All Witnesses Midway Hospital Intends to Call

**EXHIBIT "M"**

Herein; A Written Summary of the Direct Testimony of All Witnesses to be Called; and the Opportunity to Interview All Witnesses Who May Be Called Against Respondent.

Both parties shall exchange a list of all witnesses which either intends to call at the time of the hearing, and a *brief* summary of the subject matter of their testimony by 4:00 p.m., Friday, May 22, 1987.

3. Respondent's Motion for an Order Directing that all Witnesses Who are Intended to be Called at the Hearing be Instructed not to Discuss the Matter with Any Members of the Hearing Panel or the Hearing Officer.

This motion is denied.

4. Respondent's Request for an Order that in the Event that Respondent is Denied the Right to Representation by Either a Physician-Attorney or an Attorney at All Stages of the Proceeding Herein that He Alternatively be Allowed Representation by an Attorney to Appear in the Hearings to Make Legal Argument, Introduce Evidence, and Cross-Examine Witnesses.

This motion is denied.

5. Respondent's Request that in the Event that He is Denied the Right to Representation by a Physician-Attorney at All Stages of the Proceedings or by Attorney Limited to Certain Functions in the Proceeding that Alternatively Responded by Granted the Opportunity to Have His Attorney Sit in the Hearing and Advise Him Without Actually Participating in that Hearing.

Since the presence of an attorney at the hearing to advise respondent would constitute "representation", this motion is denied.

6. Respondent's Motion for an Order Permitting Him to be Represented by a Physician Who is also an Attorney at all Stages of the Proceedings Herein.

The Bylaws at Article VIII, Section 2(b) provide: "The affected practitioner shall be entitled to be accompanied by and/or represented at the hearing by a member of the medical staff in good standing, except if the member of the medical staff is also an attorney." Based upon the foregoing Bylaw provision, this motion is denied.

7. Respondent's Motion Requesting that All Reports of Expert Witnesses to be Called by the Hospital be Submitted to Respondent No Less than 10 Days Prior to Their Being Called as Witnesses.

Since the service date of the above motion was May 20, 1987, the motion would be impossible to fulfill without a further continuance which has not been requested. The hearing officer's order with respect to the witness list exchange shall apply equally to expert as well as percipient witnesses.

A ruling on all other motions will be deferred to the time of the hearing. No further pre-hearing motions will be entertained. If you wish to bring any other matters to the attention of the hearing officer, I assure you that I will give them due consideration at the time of the hearing.

Very truly yours,

SHAPIRO, POSELL &  
CLOSE

Richard E. Posell

REP/hh

cc: Midway Hospital Medical Center



JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

DECLARATION OF MARINA NINO REGARDING  
CONVERSATION WITH PEGGY FARBER

I, Marina Nino, declare that:

1. I am an adult over the age of 21 and I make this declaration to record with Peggy Farber said to me and others on June 1, 1987.

2. On June 1, 1987, Peggy Farber of Midway Hospital's Risk Management Section approached a table in the cafeteria where Marina Nino, Barbara Aviles, Rose Pierce and Suprani Watana were sitting at approximately 6:30 p.m. while we were waiting to be called into the hearing regarding Dr. Pinhas' privileges. Ms. Farber said the following:

- a. "I want to prepare you for what you are getting yourselves into."
- b. "You don't have to do this."
- c. "You can leave if you want to. You will not be persecuted or harassed if you leave."
- d. "You are on your own, the hospital will not pay for your time."
- e. "It is going to be like a court in there. There is a court stenographer. Everything you say will be taken down and under oath."
- f. "You will each be called, one by one, you will not be allowed to go in as a group."

EXHIBIT "N"

g. "You will be questioned in there by doctors, you will be cross-examined."

3. Rose Pierce asked Ms. Farber to leave because she was scaring us.

4. Shortly thereafter Kay Deol came over to the table and she and Peggy Farber stayed around and hovered around the cafeteria for the rest of the evening.

5. At Los Angeles, California on June 9, 1987, I declare under penalty of perjury that the foregoing facts are true and correct and that I would competently testify thereto if called as a witness.

(signature)  
MARINA NINO

JUDICIAL REVIEW COMMITTEE OF  
MIDWAY HOSPITAL MEDICAL CENTER

[CAPTION DELETED]

DECLARATION OF BARBARA AVILES REGARD-  
ING CONVERSATION WITH PEGGY FARBER

I, Barbara Aviles, declare that:

1. I am an adult over the age of 21 and I make this Declaration to record what Peggy Farber said to me and others on June 1, 1987.

2. On June 1, 1987, Peggy Farber of Midway Hospital's Risk Management Section approached a table in the cafeteria where Marina Nino, Barbara Aviles, Rose Pierce and Suprani Watana were sitting at approximately 6:30 p.m. while we were waiting to be called into the hearing regarding Dr. Pinhas' privileges. Ms. Farber said the following:

a. "I want to prepare you for what you are getting yourselves into."

b. "You don't have to do this."

c. "You can leave if you want to. You will not be persecuted or harassed if you leave."

d. "You are on your own, the hospital will not pay for your time."

e. "It is going to be like a court in there. There is a court stenographer. Everything you say will be taken down and under oath."

f. "You will each be called, one by one, you will not be allowed to go in as a group."

g. "You will be questioned in there by doctors, you will be cross-examined."

3. Rose Pierce asked Ms. Farber to leave because she was scaring us.

4. Shortly thereafter Kay Deol came over to the table and she and Peggy Farber stayed around and hovered around the cafeteria for the rest of the evening.

5. At Los Angeles, California on June 9, 1987, I declare under penalty of perjury that the foregoing facts are true and correct and that I would competently testify thereto if called as a witness.

(signature)

Barbara Aviles

[SIMON J. PINHAS, M.D., INC.  
LETTERHEAD DELETED]

June 1, 1987

Mitchell Feldman  
Regional Vice-President  
5925 San Vicente Blvd.  
Los Angeles, CA 90019

HAND DELIVERED

Dear Mr. Feldman,

Pursuant to the bylaws of the Medical Staff of Midway Hospital, I hereby request that you be present at the hearings regarding my medical staff privileges. I request that you be present on Tuesday June 2 at 6:30 P.M. in the Pavilion Conference room to present testimony. Your failure to appear will be prejudicial to me and in violation of the bylaws and fair procedure.

Sincerely,

Simon J. Pinhas, M.D.

EXHIBIT "O"

[SIMON J. PINHAS, M.D., INC.  
LETTERHEAD DELETED]

June 1, 1987

Arthur Lurvey, M.D.  
Chief of Medical Staff  
435 North Roxbury Drive  
Beverly Hills, CA

HAND DELIVERED

Dear Doctor Lurvey,

Pursuant to the bylaws of the Medical Staff of Midway Hospital, I hereby request that you be present at the hearings regarding my medical staff privileges. I request that you be present on Tuesday June 2 at 6:30 P.M. in the Pavilion Conference room to present testimony. Your failure to appear will be prejudicial to me and in violation of the bylaws and fair procedure.

Sincerely,

Simon J. Pinhas, M.D.



[SIMON J. PINHAS, M.D., INC.  
LETTERHEAD DELETED]

June 8, 1987

Mitchell Feldman  
Regional Vice-President  
5925 San Vicente Blvd.  
Los Angeles, CA 90019

HAND DELIVERED

Dear Mr. Feldman,

On June 2nd Dr. Miller and I Searched for you at the Midway Hospital cafeteria and the Pavilion Conference Room and we were unable to find you. Since you did not comply with my request as explained in my letter dated June 1, 1987. I again ask, Pursuant to the bylaws of the medical staff of Midway Hospital, I hereby request that you be present at the hearings regarding my medical staff privileges. I request that you be present on Tuesday June 9, 1987 at 6:30 P.M. in the Pavilion Conference Room to present testimony. Your failure to appear will be prejudicial to me and in violation of the bylaws and fair procedure.

Sincerely,

Simon J. Pinhas, M.D.

cc: Richard Posell, Esq.  
Gilbert Perlman, M.D.

[SIMON J. PINHAS, M.D., INC.  
LETTERHEAD DELETED]

June 8, 1987

Arthur Lurvey, M.D.  
Chief of Medical Staff  
435 North Roxbury Drive  
Beverly Hills, CA 90211

HAND DELIVERED

Dear Doctor Lurvey,

On June 2nd Dr. Miller and I searched for you at the Midway Hospital cafeteria and the Pavilion Conference Room and we were unable to find you. Since you did not comply with my request as explained in my letter dated June 1, 1987. I again ask, pursuant to the bylaws of the medical staff of Midway Hospital, I hereby request that you be present at the hearings regarding my medical staff privileges. I request that you be present on Tuesday June 9, 1987 at 6:30 P.M. in the Pavilion Conference Room to present testimony. Your failure to appear will be prejudicial to me and in violation of the bylaws and fair procedure.

Sincerely,

Simon J. Pinhas, M.D.

cc: Richard Posell, Esq.  
Gilbert Perlman, M.D.

**REPORT AND DECISION OF  
JUDICIAL REVIEW COMMITTEE  
IN THE MATTER OF SIMON J. PINHAS, M.D.**

June 12, 1987

The Judicial Review Committee of Midway Hospital Medical Center convened on May 26, May 27, June 1, June 2, June 9, and June 12, 1987 to hear the appeal of Simon J. Pinhas, M.D. to his summary suspension issued by the Medical Executive Committee on April 13, 1987 and the Statement of Charges dated May 7, 1987.

Members of the Committee were Ellis Berkowitz, M.D., Chairman, John Hofbauer, M.D., Jay Jordan, M.D., Debra Judelson, M.D. Alan Kessler, M.D., Stephen Seiff, M.D. and Michael Weiss, M.D.

The hearing officer appointed by the hospital was Richard E. Posell, Esq.

Following the presentation of oral and documentary evidence and opening and closing statements, the Judicial Review Committee deliberated and made the following decision:

**DECISION**

Dr. Pinhas has not established by the preponderance of the evidence that the decision of the Medical Executive Committee to summarily suspend him was: (1) arbitrary or unreasonable; and (2) should not be sustained by the evidence. This decision is based on the following discussion of each charge.

**EXHIBIT "P"**

**1. CHARGE I.A.**

**DESCRIPTION**

No history and physical examination on chart prior to surgery.

**DISCUSSION**

This charge was not sustained by the evidence. In all cases but one, there was ample evidence to show that a history and physical examination had been done prior to surgery even though the document did not appear on the chart when reviewed. One chart out of over 300 charts reviewed did not show willful disregard of hospital bylaws or policies, or substantial likelihood of immediate injury or damage to the health and safety of patients.

**2. CHARGE I.B.**

**DESCRIPTION**

Incomplete pre-operative work-up.

**DISCUSSION**

This charge was not sustained by the evidence. The evidence demonstrated that Dr. Pinhas met the standard of care in his preoperative work-up as provided in the Rules and Regulations of the hospital regarding local anesthesia and regional block anesthesia in surgery. A chest x-ray or electrocardiogram is not required for surgery as he performed it. If in some cases the spirit of the rules was broken, the letter of the rules was not. Dr. Pinhas did not willfully disregard hospital bylaws or policies nor was there a substantial likelihood of immediate injury or damage to the health or safety of patients.

## 3. CHARGE I.C.

## DESCRIPTION

Surgery contraindicated by medical condition.

## DISCUSSION

This charge was sustained by the evidence. Chronically and acutely ill patients were brought to surgery with abnormal laboratory studies and clinical findings that should have resulted in cancellation of the surgery, but did not. By doing surgery under local and regional block anesthesia without the aid of an anesthesiologist, Dr. Pinhas assumed the full responsibility to proceed with the surgery but did not appropriately check the laboratory data before surgery and cancel those cases where indicated. There was created a situation in which the patients' health and welfare were in immediate danger.

## 4. CHARGE II.A.

## DESCRIPTION

Lack of consent for procedure performed.

## DISCUSSION

This charge was not sustained by the evidence. The consents for surgery were broad enough to cover the proposed procedure, and the operative reports reflected the appropriateness of the procedure performed.

## 5. CHARGE II.B.

## DESCRIPTION

Lack of informed consent.

## DISCUSSION

This charge was not sustained by the evidence. The evidence presented by Dr. Pinhas demonstrated that the patient or their conservators were able to sign an informed consent for surgery. No willful disregard of hospital bylaws or policies was shown nor was there a substantial likelihood of immediate injury or damage to the health or safety of patients.

## 6. CHARGE II.C.

## DESCRIPTION

No intraocular lense (IOL) consent.

## DISCUSSION

This charge was not sustained by the evidence. The evidence presented by Dr. Pinhas demonstrated that the IOL consents were obtained in the doctor's office and that a reasonable attempt was made to get them to the patient's chart in a timely manner. Again, Dr. Pinhas showed by a preponderance of the evidence that there was neither a willful disregard of hospital rules nor substantial likelihood of immediate injury or damage to the health or safety of patients.

## 7. CHARGE III.

## DESCRIPTION

No assistant at surgery.



## DISCUSSION

This charge was not sustained by the evidence. The evidence indicated that no assistant was present at surgery for a few cases on a single day under extenuating circumstances. Once Dr. Pinhas was told not to break this rule again, the episode was never repeated. There was no substantial likelihood of injury to patients nor did Dr. Pinhas' conduct rise to the level of willful disregard of hospital rules.

## CONCLUSIONS

1. It was the opinion of the Judicial Review Committee that the summary suspension of Simon J. Pinhas, M.D. was reasonable and should be upheld because of the evidence brought in connection with Charge I.C.

2. The Committee further recommends the immediate reinstatement of Dr. Pinhas to the Medical Staff on the following special conditions to which Dr. Pinhas must agree:

(a) All pre-operative evaluations on Dr. Pinhas' surgical patients must be done prior to the patient's hospital admission and within seven (7) days of surgery, and medical problems identified in these evaluations shall be treated pre-operatively.

(b) Dr. Pinhas must have an anesthesiologist present in the operating room to monitor the patient and act as an additional physician to check and evaluate the medical condition and record of the patient.

(c) Dr. Pinhas' patients for ophthalmic surgery must have obtained a second opinion for this surgery pre-operatively from a panel of staff ophthalmologists approved by the Medical Executive Committee in rotational

sequence. The second opinion must support the indications for surgery.

(d) Dr. Pinhas must in all other respects conform to hospital bylaws, and rules and regulations.

3. If Dr. Pinhas agrees to the conditions for reinstatement of medical privileges, he will be on probation for six months from the date of agreement. The Medical Executive Committee shall appoint an *ad hoc* committee to review Dr. Pinhas' record at the end of or during the probationary period to see that these conditions are satisfactorily met. The *ad hoc* committee may recommend reinstatement of the suspension, removal of the conditions, continuation of the probationary period, or set new guidelines, as it wishes, and may set reasonable rules for its own operation.

4. Although not a condition of the agreement, the Judicial Review Committee suggests to Dr. Pinhas that he decrease his surgical volume so as not to tax the hospital facilities for handling a large number of outpatient cases on a single day. The surgeries are elective and can be spread out over a large time frame with equally good results.

Respectfully submitted,

ELLIS C. BERKOWITZ, M.D.  
Chairman Judicial Review  
Committee

[MIDWAY HOSPITAL MEDICAL CENTER  
LETTERHEAD DELETED]

July 6, 1987

Stephen Weitzman, MD  
Chairman of Board of Directors  
Midway Hospital Medical Center  
8635 West Third Street #1170-W  
Los Angeles, CA 90048

Re: Judicial Review Committee  
in the matter of  
Simon J. Pinhas, MD

Dear Doctor Weitzman:

The Medical Executive Committee reviewed the decision and recommendation of the Judicial Review Committee regarding Simon J. Pinhas, M.D. A copy of that decision is enclosed.

The Medical Executive Committee has unanimously voted to appeal the findings of the Judicial Review Committee regarding Charges 1.A., 1.B., 2.A., 2.B., 2.C. and 3 as well as the recommendation of the Judicial Review Committee that Dr. Pinhas be reinstated for a probationary period under certain terms and conditions. The grounds for this appeal are that the Medical Executive Committee believes that these findings and this recommendation are arbitrary and capricious. The Medical Executive Committee believes that the decision reached by the Judicial Review Committee that summary suspension of Dr. Pinhas was appropriate is correct, but further believes that this decision is supported by substantial evidence for each of the charges, and that the Medical

EXHIBIT "Q"

Executive Committee's initial recommendation of termination of medical staff membership is warranted in this case.

By copy of this letter for Dr. Pinhas I am notifying him of this appeal.

Very truly yours,

Arthur N. Lurvey, M.D.  
Chief of Staff

Enc. (Decision)  
cc. S. Pinhas, M.D.

**GOVERNING BOARD OF  
MIDWAY HOSPITAL MEDICAL CENTER**

[CAPTION DELETED]

**NOTICE OF APPEAL PURSUANT TO BYLAWS**

COMES NOW Simon J. Pinhas, M.D., in proper, and hereby states that the report and recommendations of the Judicial Review Committee, dated June 12, 1987, was received by Simon J. Pinhas, M.D., respondent, on June 29, 1987 and pursuant to Article VIII, Section 3 hereby gives notice that, without waiving any other right(s), respondent hereby appeals the decision of the Judicial Review Committee to the Governing Board.

The determinations by the Hearing Officer and the Judicial Review Committee were contrary to the rights secured by and granted to Simon J. Pinhas, M.D. by the Bylaws, the laws and Constitutions of the State of California and of the United States, were not supported by substantial evidence and were arbitrary and capricious.

DATED: July 7, 1987

By: (signature)  
Simon J. Pinhas, M.D.

**EXHIBIT "R"**

**UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

[CAPTION OMITTED IN PRINTING.]

**NOTICE OF MOTIONS AND MOTIONS TO  
DISMISS COMPLAINT AND FOR SANCTIONS;  
MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT THEREOF**

[F.R.Civ.P. Rules 11, 12(b)(1), and 12(b)(6)]

Date: September 21, 1987

Time: 10:00 a.m., Courtroom: 255



To Plaintiff, SIMON J. PINHAS, M.D., and to his attorney of record, Lawrence Silver, and co-counsel Maxwell Blecher:

PLEASE TAKE NOTICE that Defendants SUMMIT HEALTH, LTD., MIDWAY HOSPITAL MEDICAL CENTER, THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, MITCHELL FELDMAN, AUGUST READER, ARTHUR N. LURVEY, RICHARD E. POSELL, JONATHAN I. MACY, JAMES J. SALZ, GILBERT PERLMAN, PEGGY FARBER, MARK KADZIELSKI and WEISSBURG AND ARONSON, INC., hereby move this Court for an order dismissing plaintiff's complaint for damages and injunctive relief pursuant to Federal Rule of Civil Procedure 12(b)(1), and 12(b)(6). Defendants also move this Court for sanctions pursuant to Federal Rule of Civil Procedure 11, against counsel for plaintiff. These motions have been set for hearing on September 21, 1987 at 10:00 o'clock a.m. in Courtroom 255 of the United States District Court located at 312 North Spring Street, Los Angeles, California.

Defendants bring these motions on the grounds that plaintiff failed to plead a federal question sufficient to invoke federal subject matter jurisdiction (F.R.Civ.P. 12(b)(1)); failed to state a claim upon which relief can be granted (F.R.Civ.P. 12(b)(6)); and plaintiff's counsel failed to conduct a reasonable inquiry both as to the relevant facts and law prior to bringing the instant action, and prior to amending the first complaint.

These motions will be based upon these moving papers, including the attached memorandum of points and authorities, the Court's file in this action, and upon such

oral argument and documentary evidence as may be presented at the time of the hearing.

Dated: August 4, 1987

WEISSBURG AND ARONSON, INC.  
ROBERT J. GERST  
J. MARK WAXMAN  
MARK A. KADZIELSKI

By: MARK A. KADZIELSKI  
MARK A. KADZIELSKI  
*Attorneys for Defendants*

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## I.

## INTRODUCTION.

On Tuesday, May 26, 1987 this Court denied plaintiff's ex parte application for a temporary restraining order. In its order, this Court stated, "the Court seriously questions whether it has jurisdiction over plaintiff's Complaint." (A copy of the Court's order is attached as Exhibit "A"). After Defendants moved to dismiss plaintiff's complaint in its entirety, plaintiff represented that he would amend his complaint to plead additional facts showing state action. Not only has plaintiff failed to plead any further facts showing state action, but plaintiff also has elected to bring an antitrust cause of action that is frivolous and inconsistent with his previous factual and legal contentions. Defendants now move to dismiss plaintiff's complaint because: (1) plaintiff's jurisdictional claims are insufficient (2) the civil rights claims which were previously deficient have not been amended and (3) its antitrust claim is inadequately pled and is barred by the state action immunity doctrine.

## II.

## STATEMENT OF FACTS.

On April 13, 1987, the Medical Executive Committee of defendant Midway Hospital summarily suspended plaintiff's medical staff privileges as a result of, among other things, plaintiff's failure to document adequately patients' medical records, plaintiff's performance of inappropriate surgical procedures, and plaintiff's performance of surgical procedures without appropriate patient consents or required surgical assistants. (Complaint, Exhibits B and F).

Pursuant to the Midway medical staff bylaws, plaintiff appealed this suspension and the subsequent recommendation of termination of plaintiff's membership in the medical staff. On May 26, May 27, June 1, June 2, and June 9, the medical staff's Judicial Review Committee conducted a hearing that afforded plaintiff a full and fair opportunity to present any facts, witnesses, or arguments in support of his case. The Judicial Review Committee rendered a decision on June 8, 1987. Both plaintiff and the medical executive committee of the hospital have appealed the decision to the Board of Directors of defendant hospital. Ultimately, plaintiff is entitled to seek judicial review of the entire administrative hearing process in state court, pursuant to California Code of Civil Procedure Section 1094.5(d).

## III.

## ARGUMENT.

## A. STANDARDS FOR DISMISSAL FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER.

A motion to dismiss for lack of jurisdiction over the subject matter may be presented before the responsive pleading. F.R.Civ.P. Rule 12(b)(1). Dismissal is the appropriate disposition if subject matter jurisdiction is absent. *Demarest v. United States*, 718 F.2d 964, 965 (9th Cir. 1983), *cert. denied*, 466 U.S. 950, 104 S.Ct. 2150 (1984).

In a challenge to subject matter jurisdiction, "[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist."



*Thornhill Publishing v. General Telephone and Electronics*, 594 F.2d 730, 733 (9th Cir. 1979) (emphasis added).

"A federal question is jurisdictionally insubstantial if it is patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent as not to involve a federal controversy." *Demarest*, 718 F.2d at 966, citing, *Duke Power Company v. Carolina Environmental Studies Group*, 438 U.S. 59, 70-71, 98 S.Ct. 2620, 2628-2629, 57 L.Ed.2d 595 (1978).

If a jurisdictional motion involves factual issues that also involve the merits, "the trial court should employ the standard applicable to a motion for summary judgment, as a resolution of the jurisdictional fact is akin to a decision on the merits." *Augustine v. United States*, 704 F.2d at 1074, 1077 (9th Cir. 1983). "Therefore, the moving party should prevail only if the material jurisdictional facts are not in dispute and if the moving party is entitled to prevail as a matter of law." *Id.*

#### B. PLAINTIFF'S CLAIMS FOR CIVIL RIGHTS DEPRIVATION ARE PATENTLY UNSUPPORTED BY JURISDICTIONAL FACTS.

Plaintiff's amended complaint contains no additional facts to support his claim of state action. Plaintiff still predicates subject matter jurisdiction for his civil rights claims on the mere existence of California's statutory scheme governing the medical peer review process. (Complaint, ¶¶ 80, 81, 89, 111). Plaintiff still argues that given the existence of the California peer review scheme, defendants are "estopped" from denying that they act under color of state law. *Id.*

Plaintiff previously relied upon the recent decision in *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986),<sup>2</sup> which held that the Oregon statutes governing peer review proceedings within a private hospital sufficiently revealed "state action" for the purposes of immunity from civil liability under the federal antitrust laws. (Plaintiff's Mem. Pnts. & Aths., TRO, pages 5-7). Plaintiff argued that the finding of "state action" in *Patrick* controls the state action issue in the present case. (*Id.*, at page 7, lines 13-16).

Since plaintiff clearly relies exclusively upon the existence of the California statutory scheme, the jurisdictional facts are not in dispute. Moreover, plaintiff's jurisdictional theory does not involve factual issues that go to the merits of the present case, and the Court may properly rule on this jurisdictional issue as a matter of law.

#### 1. Plaintiff's Civil Rights Claims Are Foreclosed

Plaintiff argues that the mere existence of state regulation is sufficient to demonstrate state action under 42 U.S.C. Sections 1983 and 1985(3). The Supreme Court has concluded precisely the opposite.

In *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 350, (1974), the Supreme Court stated, "the mere fact that a business is subject to state regulation does not by itself convert its action to that of the state for the purposes of the Fourteenth Amendment". (Emphasis added). In *Jackson*, a customer brought suit under Section 1983 against a privately owned and operated utility company for discon-

<sup>2</sup>An appeal of this case is currently pending before the United States Supreme Court. 107 S.Ct. 1345, 94 L.Ed.2d 516, 55 U.S.L.W. 3586 (March 2, 1987).

necting her electrical service without affording her notice and an opportunity for a hearing. Although the utility company was subject to extensive state regulation, the Supreme Court concluded that the private actions of the utility company were not those of the state.

The Court reiterated that for state action to exist, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351.

If the conduct of a private utility does not constitute state action by virtue of the extensive regulation, then logically defendants' conduct in the present case cannot possibly constitute state action.

## 2. Ninth Circuit Precedents Make Plaintiff's Claims Improbable.

A trilogy of Ninth Circuit cases makes plaintiff's claims patently insubstantial. In *Aasum v. Good Samaritan Hospital*, 542 F.2d 792 (9th Cir. 1976), the court found *no state action* where a private hospital excluded a chiropractor from its facilities, even though the hospital received federal funds under the Hill-Burton Act, received both state and federal tax advantages as a non-profit corporation, and was subject to mandatory inspection and licensing regulations of the State of Oregon. *See also, Crowder v. Conlan*, 740 F.2d 447 (6th Cir. 1984). The *Aasum* court stated, "[i]t is only when the asserted discriminatory conduct is of constitutional dimension and results from action under color of state law, that the *jurisdiction* of the district courts attaches, . . . ." *Aasum v. Good Samaritan Hospital*, 542 F.2d 792, 794 (9th Cir. 1976) (emphasis added).

Second, in a due process action brought by a physician against a private hospital, the court addressed the question "whether a private hospital's receipt of federal funds . . . coupled with federal and state tax exemptions, constitutes *state action* sufficient to confer jurisdiction on this court under 42 U.S.C. § 1983." *Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc.*, 507 F.2d 1103, 1104 (9th Cir. 1974) (original emphasis). The court found *no state action*.

Finally, in *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975), the court found *no state action* where a private hospital did not renew a physician's medical staff privileges even though the private hospital received federal funds under the Hill-Burton Act. The court stated, "[t]his circuit has repeatedly held that for state involvement with a private entity to confer jurisdiction under 42 U.S.C. § 1983 the involvement must be with a specific activity of which a party complains." 520 F.2d at 896. Under these three cases, plaintiff's state regulation/state action jurisdictional theory is insubstantial and improbable if not entirely frivolous.

## 3. Plaintiff States No Claim Under Sections 1983 and 1985(3).

Should this Court determine that plaintiff properly has pleaded a federal question sufficient to invoke subject matter jurisdiction, defendants respectfully request this Court to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants move to dismiss the complaint for failure to state a claim upon which relief can be granted as an alternative to dismissal for lack of subject matter jurisdiction.



a. No Claim Under Section 1983.

To maintain an action under 42 U.S.C. Section 1983, a plaintiff must establish: (1) that defendant was acting 'under color of state law' at the time of the acts complained of; and (2) that defendant deprived plaintiff of [a] right, privilege, or immunity secured by the Constitution or laws of the United States." *Freier v. New York Life Insurance Company*, 679 F.2d 780, 783 (9th Cir. 1982).

In the present case, Defendants are private entities, and their private conduct "however discriminatory or wrongful" is not proscribed. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), quoting *Shelley v. Kraemer*, 334 U.S. 1, 13, 63 S.Ct. 836, 92 L.Ed. 1161 (1948). In order for private conduct to be considered state action, the conduct must be "fairly attributable to the state." *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2754, 73 L.Ed.2d 482 (1982). This requirement is not satisfied unless "the party charged with the deprivation . . . may fairly be said to be a state actor." *Id.* Moreover, the Court of Appeals for the Ninth Circuit has repeatedly held that private conduct may constitute state action only if the state is "involved in the specific activity complained of, . . ." (*Taylor v. St. Vincent's Hospital*, 523 F.2d 75, 77 (9th Cir. 1975)), and "the involvement must be significant." *Watkins*, *supra*, 520 F.2d at 896.

Plaintiff still predicates his jurisdictional claims exclusively upon the existence of state statutes and regulations governing peer review proceedings. Within the specific peer review proceedings at issue in the present case, plaintiff has made no allegations showing that the state has either intruded or participated or "so far insinuated itself into a position of interdependence with [a private entity] that it must be recognized as a joint participant in

the challenged activity . . ." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961).

Moreover, in light of the Supreme Court decision in *Jackson* as well as the decisions of the Ninth Circuit Court of Appeals in *Aasum*, *Ascherman*, and *Watkins*, plaintiff's case is no better than it was before he amended his complaint.

b. No Claim Under Section 1985(3).

In order to maintain an action under 42 U.S.C. Section 1985(3), plaintiff must establish (1) that a conspiracy existed; (2) that the conspiracy's purpose was to deprive a person of equal protection of the law; (3) that the conspiracy was motivated by some racial or class based discriminatory animus; and (4) that the person injured was a member of the class of persons discriminated against. *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711 (9th Cir. 1981). Moreover, if the claimed deprivation involved the First or the Fourteenth Amendments plaintiff also must establish that the deprivation involved state action. *United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983) (plurality opinion).

For the reasons previously discussed, plaintiff cannot show state action under either Section 1983 or Section 1985(3). Moreover, to withstand a Rule 12(b)(6) motion to dismiss, plaintiff's claim must contain "more than bare allegations of conspiracy." *Franco v. County of Marin*, 579 F.Supp. 1032, (N.D.Cal. 1984), *aff'd*, 762 F.2d 1017 (9th Cir. 1985). The complaint also lacks specific allegations of class-based animus. *Id.* Since plaintiff's complaint is devoid of specific factual allegations to support a Section 1985(3) claim, the complaint is devoid of merit and



should be dismissed. *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977).

#### 4. Substantial State Interests Justify Federal Abstention.

The present action raises important and sensitive issues of state health care policy. A federal district court may abstain from the exercise of jurisdiction in cases that present important questions of state policy transcending the result in the case at bar. *McIntyre v. McIntyre*, 771 F.2d 1316, 1319 (9th Cir. 1985), citing, *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1088, 87 L.Ed. 1424 (1943). The *Burford* doctrine calls for federal court abstention in cases involving important state policies and their administration by agencies existing for that purpose. As summarized by the Supreme Court, for abstention under the *Burford* doctrine, "it is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1246, 1245, 47 L.Ed.2d 483 (1976). Dismissal is the proper course rather than retention of jurisdiction. *Burford*, 319 U.S. at 334.

Moreover, the recent decision by the United States Supreme Court in *Pennzoil Company v. Texaco, Inc.*, 107 S.Ct. 1519 (April 6, 1987), also supports abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971). As stated by the Supreme Court in *Pennzoil*,

This concern mandates application of *Younger* abstention not only when the pending state proceedings are criminal, but also when certain civil proceedings are pending, if the State's interests in the proceeding

are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government. (Citation) 107 S.Ct. at 1526.

The Court continued and stated, "[a]nother important reason for abstention is to avoid unwarranted determination of federal constitutional questions." *Id.*

The present case involves interpretation of state statutes, regulations and rules that should be left to state administrative tribunals and civil proceedings to avoid the possibility of unwarranted intrusion into matters of state policy. *Oler v. Trustees of California State University and Colleges*, 80 F.R.D. 319, 320 (N.D.Cal. 1978). The state's interests in civil proceedings governing the maintenance and regulation of quality in the delivery of health care services by medical facilities apply equally well to administrative proceedings pending before defendant hospital. In the present case, the State of California has several interests in the pending administrative proceedings that justify abstention under the *Burford* if not the *Younger* abstention doctrines.

First, the state has an interest in affording discretion to administrative expertise in determining whether an applicant not only is qualified to practice a profession in the first instance, but also is qualified to assume responsibilities involved in a grant of hospital privileges. *Unterthiner v. Desert Hospital District*, 33 Cal.3d 285, 298 (1983). Second, the state has an interest in ensuring procedural fairness in administrative proceedings involving clinical privileges. *Anton v. San Antonio Community Hospital*, 19 Cal.3d 815, 829 (1977). Third, the state has an interest in ensuring that judicial review is available and proceeds in an orderly fashion. *Westlake Community Hospital v. Superior Court*, 17 Cal.3d 465 (1976). Finally,

the state has an interest in encouraging open and frank discussions in peer review proceedings. *Ascherman v. San Francisco Medical Society*, 39 Cal.App.3d 623 (1974).

By bringing this action in federal court, plaintiff has attempted to bypass the state administrative and judicial systems, to secure a civil damages action that would not be presently available under state law. Moreover, plaintiff is attempting through federal constitutional principles to usurp state control over peer review proceedings and regulation of medical conduct. Under either the *Burford* or the *Younger* abstention doctrines, in the interest of federalism and comity between federal and state courts, plaintiff's complaint should be dismissed.

C. PLAINTIFF'S ANTITRUST CLAIM IS BOTH JURISDICTIONALLY BARRED AND FACTUALLY INSUFFICIENT.

Plaintiff first initiated this action by asserting that the antitrust state action immunity doctrine applies to the California peer review process under *Patrick v. Burget*, *supra*. Now plaintiff has amended his complaint to set forth a claim for relief under the Sherman Antitrust Act, 15 U.S.C. § 1.

Moving defendants contend: plaintiff's antitrust claim for relief should be barred by the antitrust state action immunity doctrine and by the doctrine of judicial estoppel; plaintiff failed to plead any facts showing interstate commerce sufficient to support jurisdiction for a valid antitrust claim; and furthermore, plaintiff has not pleaded the elements necessary to establish a violation under Section 1 of the Sherman Act: "(1) an agreement or conspiracy; (2) resulting in unreasonable restraint of trade and (3) causing 'antitrust injury.'" *Richards v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1332

(9th Cir. 1986). Therefore, defendants respectfully request this Court to dismiss plaintiff's antitrust claim, or in the alternative, to grant defendants summary judgment.

1. The Antitrust State Action Immunity Doctrine Bars Plaintiff's Claim For Antitrust Relief.

In *Patrick v. Burget*, the Court of Appeals for the Ninth Circuit held that peer review actions taken pursuant to an express Oregon statutory scheme were actions of the state and therefore immune from antitrust liability. 800 F.2d, at 1500. In reliance upon this authority, plaintiff engaged in a comprehensive analysis of the Oregon and California statutory schemes, and asserted that, "the California scheme is not distinguishable . . ." (Plaintiff's Mem. Pnts. & Auths., page 5, line 28). Moving defendants agree.

Plaintiff has already taken the position that the California peer review scheme is indistinguishable from the Oregon peer review scheme. Now plaintiff necessarily must argue that the antitrust state action immunity doctrine does not apply, a contention diametrically opposed to his previous position. Having previously elected to pursue specific legal and factual contentions, plaintiff should be barred by judicial estoppel from reversing those contentions.

As stated by the United States District Court for the Central District of California, "[j]udicial estoppel" is a well-established rule that a party may not assert contrary positions in the same or related proceedings. It is, more properly, a rule which estops a party from 'playing fast and loose with the courts.' (citations omitted)." *Matek v. Murat*, 638 F.2d 775, 783 (C.D.Cal. 1986), citing, *Selected*



*Risks Insurance Company v. Cobelinski*, 421 F.Supp. 431, 434 (E.D. Pa., 1976).

The court in *Patrick* further stated that, "once we have determined that the state has acted to replace competition with regulation in a given market, out of respect for the sovereignty of the state, federal antitrust laws simply are displaced." 800 F.2d at 1507. Thus, the antitrust state action immunity doctrine is a bar to jurisdiction under the antitrust laws. As stated by the Court of Appeals for the Seventh Circuit, "... the state action doctrine provides an exemption from the federal antitrust laws and, if applicable, allows for dismissal of the Complaint." *Marsese v. InterQual, Inc.*, 748 F.2d 373, 384 (7th Cir. 1984). Moving defendants therefore contend that plaintiff's antitrust claim for relief should be dismissed as barred by the antitrust state action immunity doctrine.

## 2. Plaintiff Has Failed To Plead Adequately Any Effect on Interstate Commerce.

The Sherman Act prohibits contracts, combinations, conspiracies in restraint of trade or commerce "among the several states." 15 U.S.C. § 1. Jurisdiction may not be invoked under the Sherman Act unless the relevant aspect of interstate commerce is identified. "It is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship of some unspecified aspect of interstate commerce." *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242, 100 S.Ct. 502, 509 (1980). To establish jurisdiction, a plaintiff must allege the critical relationship in the pleadings. *Id.*

The jurisdictional requirement may be satisfied by either of two alternative tests: (1) the "in commerce" test, which involves a showing that the activities are

within the flow of interstate commerce, and (2) the "effect on commerce" test, which involves a showing that the activities, even though themselves wholly intrastate, nevertheless substantially affect interstate commerce. *McLain*, 444 U.S. at 242, citing *Hospital Building Company v. Trustees of Rex Hospital*, 425 U.S. 738, 743, 96 S.Ct. 1848, 1851 (1976). See also, *Carey v. Daniel Freeman Memorial Hospital et al*; 1984-1 Trader Cases (CCH) ¶ 65, 831 (C.D. Cal. November 22, 1983)

The "effect on commerce" test consists of a two-part analysis. "First, a relevant aspect of interstate commerce must be identified [and] second, the defendants' activities must be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *Palmer v. The Roosevelt Lake Log Owners Association*, 651 F.2d 1289, 1891 (9th Cir. 1981), citing, *McLain* 444 U.S. at 246. *McLain* expressly states that an interrelationship with interstate commerce will not be presumed by a local activity. Rather, "a plaintiff must allege a critical relationship within the pleadings..." *McLain*, 444 U.S. at 242.

Plaintiff has alleged only in conclusory terms that defendants "are engaged in interstate commerce." Plaintiff's conclusory allegations are insufficient to meet the standards under *McLain*. Plaintiff's conclusory allegations fail to identify any relevant line of interstate commerce, and further fail to show any substantial effect on interstate commerce. Therefore, plaintiff's claim should be dismissed.

## 3. Plaintiff Has Not Alleged Any Facts Sufficient To Constitute a Conspiracy.

Section 1 of the Sherman Act prohibits unreasonable restraints of trade effected by a conspiracy between sepa-



rate entities. "It does not reach conduct that is 'wholly unilateral' ". *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 767-768, 104 S.Ct. 2731 (1984). The Court in *Copperweld* also stated, "officers or employees of the same firm do not provide the plurality of actors imperative for a Section 1 conspiracy." *Id.* at 769. Finally, the Court stated "the coordinated activity of the parent and its wholly owned subsidiary must be viewed as a single enterprise for purposes of Section 1 of the Sherman Act." *Id.* at 771. The Ninth Circuit Court of Appeals concurs, "two or more individual officers, directors or agents within a corporation, acting on behalf of that corporation, are considered incapable of conspiring with each other or with their corporation, for Section 1 purposes." *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 fn. 7 (9th Cir. 1979).

In the present case, the defendants against whom plaintiff brings an antitrust claim must be viewed as a single entity. Plaintiff alleges that "Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Perlman, entered into a combination and conspiracy to retaliate against [plaintiff] and to preclude him from continued competition in the marketplace, . . . ." (Complaint, ¶ 124, p. 42, 11s. 14-18). Plaintiff also alleges that defendants have "effectuated a boycott" of plaintiff by filing an improper disciplinary report pursuant to California Business and Professions Code Section 805. (Complaint, ¶ 124, p. 42-43, 11s. 19-6.)

Plaintiff has admitted that Summit Health Ltd. is the parent of Midway Hospital, that Mitchell Feldman is regional vice-president of Summit Health, and that Arthur Lurvey, M.D., is Chief of Staff of Midway Hospital. (Complaint, ¶¶ 6, 9, and 11, respectively). Plaintiff fur-

ther alleges that Mitchell Feldman and Dr. Lurvey initiated the summary suspension of plaintiff's clinical privileges. (Complaint, ¶ 29, p. 10, 11s 9-16). Since Dr. Lurvey and Mitchell Feldman were acting in their official capacities in the institution of peer review proceedings, they were legally incapable of conspiring with defendant Summit Health, Midway Hospital, or the Medical Staff. Plaintiff does not allege any other facts showing that Dr. Reader, Dr. Macy, Dr. Salz, or Dr. Perlman had anything whatsoever to do with initiation of the peer review proceedings. Indeed, plaintiff does not allege so much as a conversation among them.

Plaintiff further alleges that the alleged conspiracy "enlisted the assistance and received the assistance of Mr. Posell, Mr. Kadzielski, and [Weissburg and Aronson] to create unjustified charges, . . . ." (Complaint, ¶ 124, p. 42, 11s. 25-27). In general, plaintiff alleges that the antitrust defendants "engaged in conduct to deprive plaintiff Dr. Pinhas of a fair hearing." (Complaint, ¶ 53, p. 17, 11s. 7-8).

Mr. Kadzielski and Weissburg and Aronson are legal counsel for moving defendants, and they have not acted in any capacity other than as agents for such defendants. Thus, plaintiff has further failed as a matter of law to allege any conspiracy cognizable by the Sherman Act. The institution of peer review proceedings at defendant hospital must be viewed as the action of a single entity. To the extent that a concerted refusal to deal or a group boycott also requires a plurality of actors, plaintiff's allegations of a group boycott are also insufficient and therefore should be dismissed.

4. Plaintiff Has Failed To Plead Any Facts Showing An Unreasonable Restraint of Trade.

Plaintiff has instituted the present action in response to defendant hospital's summary suspension of his clinical privileges. Plaintiff apparently complains of two genres of harm: potential injury to his personal practice, and injury from unfair procedures in the administrative hearings. (Complaint, ¶¶ 122, 124, 126.)

Nowhere does plaintiff allege an adverse effect on competition distinguished or distinguishable from the effects on plaintiff's own medical practice. "Absent injury to competition, injury to plaintiff as a competitor will not satisfy the pleading requirement of Section 1." *Falstaff Brewing Company v. Stroh Brewery Company*, 628 F.Supp. 822, 827 (N.D.Cal. 1986), citing *Brunswik Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). "The antitrust laws were enacted for the protection of competition not competitors." *Id.* Thus, the elimination of a single competitor, such as plaintiff, standing alone, will not constitute injury to competition compensable under the Sherman Act. *Falstaff Brewing Co.*, 628 F.Supp. at 828; *Gough v. Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978).

If there are many competitors in the market, an injury to one competitor will not have an effect on consumers or anyone else beside the competitor in question. *Id.* Plaintiff has made no allegations that defendants enjoy either market power or control access to an unique element essential for competition. In the present case, plaintiff is only one competitor among many in the relevant market for ophthalmological services. Therefore, plaintiff has not pleaded, and cannot advance sufficient evidence of an unreasonable restraint of trade or an adverse effect on competition that is distinct from his individual business.

5. Plaintiff Has Failed To Plead Any Facts Showing Antitrust Injury.

Plaintiff also complains about procedural fairness, alleging that Lacey Court Reporting Service, Weissburg and Aronson, Mr. Kadzielski, and other defendants have conspired to deny plaintiff a fair hearing, and a transcript of that hearing. Even if plaintiff's allegations of procedural unfairness were true, any injury to plaintiff arising therefrom would not be injury cognizable under the Sherman Act. Plaintiff's due process rights, or his rights to fair procedure, his rights to a timely transcript, and his rights to unintimidated witnesses, are not rights either in nature or in scope required by or protected by antitrust laws. As stated by the United States Supreme Court in *Northwest Wholesale Stationers v. Pacific Stationery and Printing Co.*, 105 S.Ct. 2613, 2619 (1985), "In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis."

D. PLAINTIFF'S CLAIM FOR DECLARATORY RELIEF DOES NOT PRESENT A CASE OR CONTROVERSY AGAINST MOVING DEFENDANTS.

Plaintiff has amended his complaint to include a new claim for declaratory relief against certain defendants including the California State Board of Medical Quality Assurance ("BMQA"). Plaintiff contends that these defendants are enforcing and participating in the enforcement of unconstitutional medical quality assurance statutes, both state and federal, that require hospitals to file reports of specified disciplinary actions taken with respect to a physician's clinical privileges. Thus, plaintiff seeks a declaratory judgment that Sections 805 and 805.5 of the California Business and Professions Code, and Sections 423 *et seq.* of the Health Care Quality Improve-



ment Act of 1986 (42 U.S.C. § 11133 *et seq.*), are unconstitutional.

Plaintiff's claim for declaratory relief does not present a case or controversy against moving defendants. As shown above, subject matter jurisdiction does not exist, and even if jurisdiction did exist declaratory relief would be inappropriate as against the moving defendants. Finally, the pendency of state administrative proceedings justifies abstention by this Court.

1. A Claim for Declaratory Relief Cannot Extend Jurisdiction.

Declaratory relief is a procedural device only, and "does not confer an independent basis of jurisdiction on the federal court." *Alton Box Board Company v. Esprit De Corps*, 682 F.2d 1267 (9th Cir. 1982). Thus, "the use of the declaratory judgment statute does not confer jurisdiction by itself if jurisdiction would not exist on the face of a well-pleaded complaint without the use of 28 U.S.C. § 2201." *Janakes v. United States Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985). The requirement of a "case or controversy" still holds, and "the question in each case is whether the facts alleged, under all of the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Company v. Pacific Coal and Oil Company*, 312 U.S. 270, 273, 61 S.Ct. 510 (1965); *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532, 535 (9th Cir. 1969).

Under these standards, plaintiff has not pleaded facts sufficient to demonstrate any substantial controversy between plaintiff and moving defendants on the issue of constitutionality of the disciplinary reporting statutes.

First, contrary to plaintiff's convenient allegations that "Defendants contend and seek a declaration to the contrary," moving defendants do not have an interest in controverting plaintiff's challenge to state and federal disciplinary reporting statutes. Defendants' involvement is mandatory under the statutes, purely ministerial and thus peripheral to the allegations underlying plaintiff's claim for declaratory relief. Moreover, plaintiff can neither allege nor adduce evidence showing that defendants would attempt to enforce the challenged statutes if this Court were to declare them unconstitutional. Therefore, the claim should be dismissed against them. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1361, (1977), *cert. granted in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 99 S.Ct. 2843, 436 U.S. 943, *affirmed in part, reversed in part*, 99 S.Ct. 1171, 440 U.S. 391, *on remand*, 474 F.Supp. 901.<sup>1</sup>

Second, plaintiff's claim for declaratory relief lacks sufficient immediacy to warrant the issuance of a declaratory judgment, particularly in light of the administrative and judicial procedures available to plaintiff to challenge the appropriateness of the hospital disciplinary actions, which if properly invoked and proven, may allow plaintiff to reverse and expunge his professional record both at the hospital and with the BMQA. For these reasons, moving defendants contend that plaintiff has not demonstrated a case or controversy sufficient to invoke subject matter jurisdiction of this Court.

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<sup>1</sup>In *Jacobson*, the district court originally dismissed claims for monetary and declaratory relief against certain counties that merely enforced an ordinance that had been passed by the Tahoe Regional Planning Agency that allegedly infringed the constitutional rights of the plaintiffs in that case. Defendants' position is analogous to the position of defendant counties in *Jacobson*.



## 2. Declaratory Relief is Inappropriate Against Moving Defendants.

Should this Court find that plaintiff has adequately demonstrated subject matter jurisdiction for declaratory relief, defendants further contend that plaintiff's claim should be dismissed because any declaratory judgment would be inappropriate.

Whether to entertain the claim and grant declaratory relief is a matter within the discretion of the court. *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d at 535. However, declaratory relief is only appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding (Citation)." *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986).

In the present case, a judgment declaring federal and state disciplinary reporting statutes unconstitutional would not settle or clarify any legal relations between plaintiff and moving defendants. Nor would such a judgment terminate the controversy giving rise to this proceeding. Plaintiff has raised a new issue entirely collateral to the pending peer review proceedings.

Moreover, a judgment declaring federal and state statutes unconstitutional would also be inappropriate to the extent that the contemplated declaration would be *res judicata*, and would frustrate the BMQA's investigative power to hear evidence and decide plaintiff's case for itself.

## 3. Pendency of Administrative Proceedings Justifies Federal Abstention.

Should this Court find that plaintiff has properly invoked subject matter jurisdiction for declaratory relief, moving defendants further contend that this Court should abstain from the exercise of jurisdiction to render a declaratory judgment because the administrative proceedings at defendant hospital are still pending.

The United States Supreme Court has emphasized that the declaratory judgment procedure should not be used to preempt or prejudge issues that are committed for initial decision to an administrative body. *Public Service Commission v. Wycoff Company*, 344 U.S. 237, 246, 73 S.Ct. 236, 97 L.Ed. 291 (1952); *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d at 535-536. The Supreme Court was even more emphatic with regard to the use of the declaratory judgment procedure for proceedings pending before a state administrative agency. The Court stated,

an anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the [agency] cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the [agency] before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

*Public Service Commission*, 344 U.S. at 247. Thus, it is inappropriate for a court to intervene when a case is properly before an administrative agency, *State of California v. Oroville-Wyandotte* 409 F.2d at 536, a principle that not only applies to proceedings that potentially may be

instituted by the BMQA, but also should apply to the proceedings pending before the hospital administrative board.

Thus, moving defendants contend that even if subject matter jurisdiction exists, the pendency of and potential for state administrative proceedings justifies federal abstention from the exercise of jurisdiction to render a judgment declaring federal and state disciplinary reporting statutes to be unconstitutional.

#### E. SANCTIONS AGAINST PLAINTIFF'S COUNSEL ARE WARRANTED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 11.

Federal Rule of Civil Procedure 11 provides in relevant part:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

The certificate mandated under Rule 11 addresses two separate problems: the problem of frivolous filings and the problem of misusing judicial procedure. In the present case, moving defendants contend that sanctions, in the form of attorneys fees reasonably incurred in bringing the second motion to dismiss, should be assessed against plaintiff's counsel not only for frivolous filings, but also for interposing the amended complaint for an improper purpose.

#### 1. Plaintiff's Amended Complaint Is Without Factual Foundation And Is Legally Unreasonable.

"Rule 11 sanctions shall be assessed if the paper filed in district court and signed by an attorney or an unrepresented party is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith." *Zaldivar v. The City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986), *cert. denied*, 106 S.Ct. 2919, rehearing denied, 107 S.Ct. 12 (1986). The subjective intent of the pleader is not controlling. The standard is objective reasonableness, as compared to a competent attorney admitted to practice before the district court. *Zaldivar*, 780 F.2d at 830. In the present case, moving defendants contend that plaintiff's amendment is frivolous, legally unreasonable, and without factual foundation on the following three grounds.

First, plaintiff's initial argument that the antitrust state action immunity doctrine established in *Patrick v. Burget* necessarily required a finding of state action for the purposes of a civil rights suit was legally unreasonable. "A good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after 'reasonable inquiry'". *Zaldivar*, 780 F.2d at 831. Under the circumstances of this case, plaintiff's failure to undertake a reasonable inquiry is clear from his failure to find, to consider, and to bring to the Court's attention the decision of the Court of Appeals for the Seventh Circuit in *Ezpeleta v. Sisters of Mercy Health Corporation*, 800 F.2d 119 (7th Cir. 1986), which specifically rejected plaintiff's purported legal argument. Not only did the decision in *Ezpeleta* directly dismiss plaintiff's argument, but both common sense and legal sense suggest that antitrust doctrine is not relevant in civil rights actions.



Second, notwithstanding plaintiff's representation that the first amended complaint would make "additional allegations to support the existence of state action in connection with this matter" (Plaintiff's Mem. Pnts. Aths. in Opposition, pp. 1-2), plaintiff has not changed any allegations whatsoever with respect to the factual foundation for state action. Plaintiff continues to assert that defendants are legally "estopped" from arguing that their conduct is not state action. Plaintiff's failure not only to allege additional facts indicating state action, but also to amend as represented, clearly indicates that plaintiff's civil rights claim is without factual foundation, and is legally unreasonable.

Third, plaintiff's addition of an antitrust claim lacks both factual and legal foundation. Plaintiff's complaint is utterly devoid of facts alleging or demonstrating the jurisdictional prerequisites of antitrust injury, a substantial effect on interstate commerce, and a legally cognizable conspiracy. Moreover, plaintiff's antitrust claim is diametrically opposed to his previous position regarding the antitrust state action immunity doctrine in *Patrick v. Burget*, and is irremediably inconsistent with plaintiff's essential allegations that the summary suspension took place in peer review proceedings. Thus, plaintiff's counsel evidently has not undertaken a reasonable inquiry into either the factual or legal foundations for an antitrust claim, an inquiry plaintiff's counsel is obligated to undertake before filing his complaint.

## 2. Plaintiff's Counsel Has Interposed The Amended Complaint For Improper Purposes.

Rule 11 also mandates sanctions when a pleading or paper is filed "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase

in the cost of litigation." In the present case, plaintiff's first amended complaint has been interposed not only for the purpose of harassment and needless increase in the cost of litigation, but also to secure a federal forum for a claim otherwise cognizable only in state courts if at all. Four factors demonstrate that plaintiff's first amended complaint has been filed for improper purposes.

First, plaintiff had absolutely no basis in fact or in law to join defense counsel, Weissburg and Aronson, Inc., and Mark Kadzielski, as defendants, and his so doing must have been intended solely to harass defense counsel. Since defense counsel are also involved in the pending administrative appellate proceedings before the Midway Hospital Board in this case, the effects of such harassment are magnified.

Second, plaintiff's first amended complaint leaves entirely unchanged the factual allegations in support of plaintiff's civil rights claims. As stated above, plaintiff represented that he would amend to make additional factual allegations in support of state action. Plaintiff has not done so, and his failure must be construed as an admission that no such factual foundation exists. Despite the absence of factual foundation, plaintiff elected to preserve these civil rights claims, a choice that unnecessarily increases the cost of litigation, and that serves only to harass. Moreover, this Court may deny plaintiff any further right to amend on these claims, because "where the party seeking amendment knows or should know of the facts underlying the amendment when the original complaint is filed, the motion to amend may be denied." *Sierra Club v. Union Oil of California*, 813 F.2d 1480, 1493 (9th Cir. 1987).

Third, plaintiff's first amended complaint sets forth a claim for federal antitrust relief. Plaintiff necessarily



must argue that the antitrust state action immunity doctrine under *Patrick v. Burget* does not apply, yet plaintiff has already acknowledged that the antitrust state action immunity doctrine recognized in *Patrick v. Burget* applies to the California peer review scheme. Plaintiff is " 'playing fast and loose with the courts.' " *Matek v. Murat*, *supra*, 638 F.Supp. at 783.

Finally, plaintiff's first amended complaint contains an additional claim for declaratory relief. As discussed above, not only has plaintiff failed to allege subject matter jurisdiction independent of this remedy, but plaintiff cannot properly seek a declaratory judgment against moving defendants. In light of the inappropriateness of declaratory relief against moving defendants, plaintiff's evident intent for adding such a claim can only be to secure federal court jurisdiction. Plaintiff's shopping for a federal forum over a state forum must be deemed an improper purpose subject to sanctions under Rule 11.

For the foregoing reasons, moving defendants justifiably and reasonably contend that plaintiff's first amended complaint is without factual foundation, and is legally unreasonable. Plaintiff was on notice not only from defendants' previous motion to dismiss, but also from this Court's "serious questions" regarding subject matter jurisdiction, that plaintiff does not belong in federal court. Thus, his improper efforts to remain there must be subject to sanctions.

## IV.

## CONCLUSION.

For the reasons set forth above, Defendants respectfully request this Court to dismiss Plaintiff's complaint in its entirety.

Dated: August 4, 1987

WEISSBURG AND ARONSON, INC.  
ROBERT J. GERST  
J. MARK WAXMAN  
MARK A. KADZIELSKI

By: \_\_\_\_\_ (Signature)  
MARK A. KADZIELSKI  
*Attorneys for Defendants*

[PROOF OF SERVICE OMITTED IN PRINTING]

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

**OPPOSITION TO MOTION TO DISMISS; MEMO-  
RANDUM OF POINTS AND AUTHORITIES IN SUP-  
PORT THEREOF**

Date: Sept. 21, 1987, Time: 10:00 a.m.,  
CourtRoom: The Honorable Ferdinand F. Fernandez

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## I.

## INTRODUCTION

This is a case of first impression. *Never* has a Federal court ruled upon the constitutionality of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 1111, et seq. ("HCQIA") or state statutes such as §§ 805 and 805.5 of the California Business and professions Code (B&P Code). *Never* has a Federal court had to rule as to whether the state action requirements for the maintenance of a civil rights case arises in light of the operation of those two statutes. *Never* has a Federal court had to rule on the issue of the elements necessary to state an antitrust cause of action after HCQIA. Since "a motion to dismiss should be disfavored, and doubts should be resolved in favor of the pleader", *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976), important issues, including civil rights issues, *Guillam v. Orange*, 731 F.2d 1379, 1381 (9th Cir. 1984), should not be decided on a motion to dismiss, *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Understanding plaintiff's case requires an analysis of HCQIA. Thus, plaintiff will first analyze the antitrust claim and then proceed to the civil rights and declaratory claims.

## II.

## PLAINTIFF'S ANTITRUST CLAIMS

The six arguments asserted by defendants seeking to dismiss the Fourth Count, the antitrust count of plaintiff's First Amended Complaint, are: (1) peer review proceedings deemed "state action" are immunized from antitrust liability, *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986); (2) the plaintiff is estopped from contending that no such immunity exists; (3) the complaint fails to

allege sufficient effects on interstate commerce to assert a federal antitrust claim; (4) the named conspirators are, as a matter of law, incapable of conspiring to violate Section 1 of the Sherman Act; (5) the plaintiff's claims lack the requisite adverse impact on competition; and (6) no antitrust injury is demonstrated in the Complaint. Each assertion is controverted and is entirely without merit.

## A. Defendants Are Not Entitled to Immunity

Defendants, relying on *Patrick*, argue that the state action doctrine immunizes defendants' peer review from antitrust liability. The sweeping judicially created immunities afforded by *Partick*, however, have been preempted by the express immunity provisions contained in the HCQIA. Passed after *Patrick*, on November 14, 1986, HCQIA is applicable to this case. It provides standards for medical professional review, and provides conditional immunity from the antitrust laws. 42 U.S.C. §§ 11111-12.

HCQIA expressly immunizes peer review from antitrust liability provided that the peer review committees meet the requirements set forth in § 11112. Specifically, HCQIA grants immunity only to those peer reviews undertaken with: (1) the reasonable belief that the action is in furtherance of quality of health care, (2) a reasonable effort to obtain the facts, (3) adequate notice and hearing procedures and (4) a reasonable belief that the review was warranted by the facts known after reasonable efforts to obtain facts and after affording the physician adequate notice and hearing procedures.

The allegations of plaintiff's complaint, deemed true on a motion to dismiss, detail the facts showing that defendants' peer review failed to meet the § 11112 standards, ¶ 126; see also ¶¶ 27-78; as such, defendants' conduct is

not afforded immunity from antitrust liability under HCQIA.

The Court is required to presume that HCQIA's comprehensive standards for antitrust immunity preempt prior case law governing peer review, including the *Patrick* decision. *Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318, 101 S.Ct. 1784, 1793 (1981); *In re Oswego Barge Corp.*, 644 F.2d 327, 335 (2d Cir. 1981) (presumption in favor of preemption of federal common law whenever it can be said that Congress has legislated on the subject). Under this rule, courts must presume that federal common law has been preempted as to every question to which the legislative scheme spoke directly and every problem that Congress has addressed. *Oswego*, 664 F.2d at 335.

In its subsection entitled "Limitation on damages for professional review actions", HCQIA speaks directly to the issue of what immunity should be afforded to peer review activities. Congress intended by HCQIA to encourage good faith professional review activities by removing any impediment to physician participation in the peer review created by the fear of liability. The legislative history reveals that Congress was particularly concerned with physicians' exposure to antitrust suits, H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3, reprinted in 1986 U.S. Code Cong. & Ad. News 6384, 6385-86, and felt "that some immunity for the peer review process is necessary." *Id.* at 6391.

The existence of a comprehensive grant of conditional immunity for peer review committees compels the conclusion that Congress intended this act to supercede existing judicially-created immunities. See *Oswego*, 664 F.2d at 343. In fact, the House debate on the bill acknowledged particularly the immunity accorded by the Ninth Circuit in *Patrick*, see 132 Cong. Rec. H9960-62 (Oct. 14, 1986),

and rejected *Patrick's* grant of immunity based solely on the state legislated mandate authorizing peer review without regard to the due process considerations.

The narrower immunity afforded under HCQIA is grounded on considerations wholly separate and distinct from those presented in the state action immunity articulated in *Patrick*. HCQIA's immunity provisions are triggered by the hospital's compliance with the protections enumerated in § 11112. Under HCQIA, therefore, the immunity extends only to peer reviews undertaken for appropriate "quality of care" purposes and pursuant to articulated requirements of procedural regularity. 132 Cong. Rec. H9957 (Oct. 14, 1986). Conversely, the state action immunity afforded by *Patrick* is grounded not on the particularities of the individual peer review, but rather on the nature of the legislative mandate which authorizes physician peer review. Where, as in *Patrick*, it is clear that the legislature intended "to replace competition with regulation in the relevant market", antitrust immunity will attach. *Patrick*, 800 F.2d at 1505.

To permit the immunity conferred by the Court in *Patrick* to remain in force would, therefore, contradict express Congressional intentions and render HCQIA's express immunity provisions wholly superfluous. Such a construction, therefore, is unjustified. Cf., *Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977) (Congress cannot be presumed to have enacted a wholly superfluous statute).

Nor is the blanket state action immunity afforded peer review activities by *Patrick* consistent with the narrower conditional immunities authorized by HCQIA. As its legislative history make clear, Congress granted only limited antitrust immunity to peer review, noting in particular its intention not to "insulat[e] improper anticom-



petitive behavior from redress." 1986 U.S. Code Cong. & Ad. News at 6386. "[A]ctions that are really taken for anticompetitive purposes will not be protected under this bill." 132 Cong. Rec. H9957 (Oct. 14, 1986).<sup>1</sup>

Given the inconsistent rationales for the immunity afforded by HCQIA versus the *Patrick* decision and the different degree of protections afforded under each, the express legislative mandate would be frustrated were *Patrick* not to be considered preempted. See *Oswego*, 664 F.2d at 343. As presented by the facts of this case, the application of judicially-created state action immunity to the peer review activities authorized by the State of California would vitiate the need for these groups to satisfy procedural requirements for antitrust immunity which HCQIA expressly requires. One of its critical objectives, the introduction of procedural uniformity into the peer review process, would be lost. Thus, in order to preserve its express provisions, inconsistent federal case law, such as the *Patrick* opinion, must be considered preempted. See *City of Milwaukee*, 451 U.S. at 320, 101 S.Ct. at 1794; *Oswego*, 664 F.2d at 344 (judge-made rules

<sup>1</sup>In describing the rationale behind the limited immunity conferred on peer review proceedings by HCQIA, the House Report stated:

"Initially, the Committee considered establishing a very broad protection from suit for professional review actions. In response to concerns that such protection might be abused and serve as a shield for anti-competitive economic actions under the guise of quality controls, however, the Committee restricted the broad protection. As redrafted, the bill now provides protection only from damages in private actions, and only for proper peer review, as defined in this bill . . . If the professional review actions being challenged fail to meet the standards of section 102(a), no immunity is provided and the suit can be tried without regard to the provisions of this bill." 1986 U.S. Code Cong. & Ad. News at 6391 (emphasis added).

may not rewrite rules that Congress has affirmatively and specifically enacted).

*Patrick* does not survive HCQIA for additional reasons. Congress, aware of the immunity granted by *Patrick*, nonetheless did not include an immunity for "state action" arising out of peer review. If Congress has acted to grant an exception, it is presumed that that is the only exception it intended to grant, *Andrus v. Glover Const. Co.*, 466 U.S. 608, 616, 100 S.Ct. 1905, 1910 (1980).

"We have noted that immunity from the antitrust laws is not lightly inferred. [Citations omitted.] Immunity of regulated activities from the antitrust laws depends on congressional intent: the inclusion of an express statutory exemption . . . implies that conduct not covered by the statute remains subject to the antitrust laws. [Citations omitted.]" *Cain v. Air Cargo, Inc.*, 599 F.2d 316, 320 (9th Cir. 1979).<sup>2</sup>

#### B. Plaintiff is Not Estopped.

The applicability of HCQIA to this action renders defendants' argument that plaintiff should be estopped from distinguishing *Patrick* moot. See *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984), cert. denied, 469 U.S. 1197 (1985). Plaintiff never asserted that the decision in *Patrick* controls his civil rights claim

<sup>2</sup>"The *expressio unis* principle is based upon a presumption that by providing a specific remedy, Congress intended to exclude others. Reason dictates that the more thoroughly a bill is considered, the greater likelihood that the *expressio unis* presumption accurately reflects reality." *Keaukaha-Panaewa Comm. Ass'n v. Hawaiian Homes Comm.*, 588 F.2d 1216, 1223 (9th Cir. 1979), cert. denied, 444 U.S. 826, 100 S.Ct. 49 (1979).



on this case;<sup>3</sup> rather, what plaintiff asserted was that peer review was held to the "state action" for "antitrust" purposes and that the determination of "state action" was applicable to civil rights cases. Plaintiff maintained that position before and maintains that position today. In any event, defendants misapply the principle of judicial estoppel. Judicial estoppel requires that the position asserted by a litigant be inconsistent with one that it previously persuaded the court to adopt. *Arizona*, at 1215. In this case, this Court appears not to have accepted plaintiff's position or even defendants' mischaracterization of it, and, therefore, judicial estoppel does not apply.

C. Plaintiff Has Adequately Alleged That Defendants' Activities Substantially Affect Interstate Commerce.

If a complaint alleges facts demonstrating that the defendants' business activities, taken as a whole, do not have an insubstantial effect on interstate commerce, the jurisdictional interstate commerce requirements of the Sherman Act are met.<sup>4</sup> *Hospital Building Co. v. Trustees of*

<sup>3</sup>Neither in the original Complaint nor in the First Amended Complaint, did plaintiff affirmatively make such allegation. Plaintiff alleged that defendants were "estopped from denying that the action" which were taken and threatened were "under authority of the laws of the State of California", Compl. ¶ 14, First Amended Compl. ¶ 80.

<sup>4</sup>In evaluating whether this jurisdictional requirement has been satisfied, the Court first identifies a relevant aspect of interstate commerce. Then it evaluates the defendants' activities, taking into account their overall effect on interstate commerce and not simply their effect on the particular plaintiff. If these activities are shown "as a matter of practical economics" to have a not insubstantial effect on interstate commerce, the jurisdictional standard is satisfied. *Palmer v. Roosevelt Lake Log Owners Ass'n, Inc.*, 651 F.2d 1289, 1291 (9th Cir. 1981). At this preliminary inquiry, therefore, it is unlawful

*Rex Hospital*, 425 U.S. 738, 743, 96 S.Ct. 1848, 1852 (1976); *Hahn v. Oregon Physicians Service, supra*. The complaint need only show that the defendants' activities well place " 'unreasonable burdens on the free and uninterrupted flow' of interstate commerce." *Rex Hospital*, 425 U.S. at 746, 96 S.Ct. at 1853; *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68, 74 (3rd Cir. 1983). Thus, wholly local activities may satisfy the jurisdictional requirements if they adversely affect interstate commerce, *Rex Hospital*, 425 U.S. at 743, 96 S.Ct. at 1851; *McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 237, 100 S.Ct. 502, 506 (1980).

The requirement of an effect on interstate commerce considers both the plaintiff's and defendant's activities as relevant. *Hahn*, 689 F.2d at 844. The plaintiff's interstate contacts are relevant because the jurisdictional requirement may be satisfied by showing that defendants' activities affect interstate commerce through their effect on plaintiff's interstate activities. *Id.*: see, e.g., *Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848. However, if the plaintiff's interstate contacts are insubstantial, jurisdiction may also be established directly by the defendants' activities. *Hahn*, 689 F.2d at 844; *Western Waste Service Systems v. Universal Waste Control, Inc.*, 616 F.2d 1094, 1097 (9th Cir. 1980), *cert. denied*, 449 U.S. 869 (1980).

The complaint<sup>5</sup> identifies the relevant aspect of interstate commerce as the provision of eye medicine and

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conduct itself, that will be evaluated. *Hahn v. Oregon Physicians Service*, 689 F.2d 840, 844 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983).

<sup>5</sup>As on all motions to dismiss a complaint, this court must take the complaint's allegations as true and cannot dismiss the complaint unless it is beyond doubt that the plaintiff can prove no set of facts consistent with the complaint that would establish the requisite nexus

ophthalmologic surgery, see ¶¶ 121-122. Within this line of commerce, the complaint enumerates specifically those activities of the defendant which adversely affect interstate commerce — both indirectly, through their effect on Dr. Pinhas' interstate contacts, and directly through the defendants' contacts.

As to the plaintiff's interstate contacts, the complaint specifically alleges that Dr. Pinhas has a national and international reputation as a specialist in corneal eye problems, ¶ 22. It also alleges that Dr. Pinhas receives substantial revenues from Medicare, the federal health insurance program for the elderly. *Id.* ¶¶ 24-26. In addition, it states that the defendants' termination or restriction of Dr. Pinhas' staff privileges will prevent him from practicing in Los Angeles and at other hospitals in the United States by virtue of the mandatory federal and state reporting requirements, ¶¶ 124-25.<sup>6</sup>

The interstate character of a physician's practice and the interstate payment of fees by Medicare or other insurance companies are well-recognized methods for demonstrating the requisite effect on interstate com-

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with interstate commerce. *McLain v. Real Estate Board, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 511 (1980); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 380 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985); *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir. 1980), *cert. denied*, 449 U.S. 869 (1980).

<sup>6</sup>California law requires hospitals, and federal law provides anti-trust immunity if hospitals, report termination or restriction of privileges, ¶¶ 80-84, 90. Defendants have threatened to file such reports concerning Dr. Pinhas, ¶¶ 92-93. Hospitals are required to request such reports before granting or renewing staff privileges, ¶¶ 80-84, 90, 100-02. Hospitals commonly refuse to admit physicians whose reports cast doubt on their competence or on the quality of their patient care, ¶¶ 103, 124. Hence, defendants effectively control plaintiff's access to other hospitals in addition to Midway, ¶¶ 124-25.

merce. *Marrese v. Interqual, Inc.*, 748 F.2d 373, 377-78, 382-83 (7th Cir. 1984); *Cardio-Medical*, 721 F.2d at 76. Moreover, the allegation that a physician will not be able to practice medicine because other hospitals will not risk granting privileges to a physician whose privileges have previously been terminated or restricted has also been found sufficient. *Marrese*, 748 F.2d at 378, 380, 383.

The complaint alleges the defendants' substantial interstate business activities and that defendants receive substantial revenue from Medicare, ¶¶ 24-26. In addition, the complaint alleges that defendant Summit Health, Ltd. owns and operates approximately 19 hospitals and 49 nursing home facilities in California, Arizona, Colorado, Oregon, Iowa, Washington, Texas and Saudi Arabia, ¶ 6.<sup>7</sup>

#### D. Plaintiff Has Properly Alleged an Antitrust Conspiracy.

Plaintiff alleges a conspiracy to boycott Dr. Pinhas and eliminate him from the market for ophthalmologic surgery among the following defendants: (1) Summit health and Midway Hospital,<sup>8</sup> (2) the Medical Staff, (3) Dr. Reader,

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<sup>7</sup>Plaintiff has not had an opportunity to conduct discovery on the full scope and extent of defendants' activities in interstate commerce. It is well established that courts should not dismiss the complaint before affording the plaintiff discovery on the jurisdictional matters. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976). Therefore, should this Court determine that plaintiff's interstate contacts are insufficient at this pleading stage to establish the interstate commerce element, plaintiff requests discovery before this court rules on defendants' motion.

<sup>8</sup>The rule regarding a parent's ability to conspire with its subsidiary articulated in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 2741 (1984), applies only to those entities which are wholly-owned. As Summit Health may own less than 100% of Midway, the possibility of a conspiracy post-*Copperweld* is not



Dr. Lurvey, Dr. Macy, Dr. Salz and Dr. Perlman, (4) Mr. Feldman, regional vice-president Summit Health, and (5) Mr. Kadzielski and Weissburg & Aronson, counsel for defendants. ¶¶ 6-15, 17-18, 122, 124. Defendants argue that these parties are legally incapable of conspiring on three grounds: (1) the Hospital, its parent, the Medical Staff and its member doctors constitute a "single entity"; (2) the medical staff and individual defendants are the equivalent of corporate officers and employees; and (3) Mr. Kadzielski and Weissburg & Aronson were acting merely as agents for the defendants. These arguments, entirely without factual merit, are inappropriate on a motion to dismiss.

The nature of the defendants' relationships and their ability to conspire is a question of fact. *Los Angeles Mem. Coliseum Comm. v. National Football League*, 726 F.2d 1381, 1387 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). At the pleading stage, the plaintiff need only allege sufficient facts to identify the participants to and nature of the conspiracy. *BBD Trans. Co. v. Southern Pacific Trans. Co.*, 627 F.2d 170, 173 (9th Cir. 1980). Plaintiff has clearly satisfied this requirement.

1. The Hospital, Its Parent, the Medical Staff and Individual Physicians Do Not Constitute a Single Entity.

Capacity to conspire is determined by a factual analysis of the economic substance of the business association. *Coliseum*, 726 F.2d at 1387. It is by now axiomatic that independent and competing economic actors in an association are legally capable of conspiring within the meaning

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precluded. However, should plaintiff discover that the subsidiary is wholly-owned, plaintiff will amend the complaint to eliminate its intraenterprise conspiracy allegations.

of Section 1 of the Sherman Act. *Coliseum*, 726 F.2d at 1387-90; see also *United States v. Topco Association, Inc.*, 405 U.S. 596, 609, 92 S.Ct. 1126, 1134 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350, 352-53, 87 S.Ct. 1847, 1849-50 (1967); *Associated Press v. United States*, 326 U.S. 1, 26, 65 S.Ct. 1416, 1427 (1945).

The Third Circuit has specifically held that a hospital medical staff is a combination of individual doctors and that the staff's actions satisfies the conspiracy requirement of Section One. *Weiss v. York Hospital*, 745 F.2d 786, 814 (3d Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985); see also *Quinn v. Kent General Hospital, Inc.*, 617 F.Supp. 1226, 1242 (D. Del. 1985). The Court in *Weiss* reasoned that:

"The . . . medical staff is a group of doctors, all of whom practice medicine in their individual capacities, and each of whom is an independent economic entity in competition with other doctors in the . . . medical community. Each staff member, therefore, has an economic interest separate from and in many cases in competition with the interests of other medical staff members. Under these circumstances, the medical staff cannot be considered a single economic entity for purposes of antitrust analysis."

*Id.* at 815. Members of the medical staff, including those who do not practice in the same specialty, compete for such things as operating rooms and hospital beds, and therefore have an economic interest in limiting the number of physicians admitted to the staff. *Quinn*, 617 F.Supp. at 1242.

The defendant Medical Staff and the individual defendant physicians are therefore capable as a matter of law of conspiring with each other to exclude competitors. *Id.*



at 1242. Plaintiff's complaint alleges that the Medical Staff is an unincorporated association comprised of independent physicians who are competitors, ¶¶ 8, 10-11, 13-15. Dr. Lurvey is Chief of Staff and is a practicing physician and surgeon, ¶ 11. Drs. Reader, Macy, Salz and Perlman are members of the Medical Staff and compete with each other and Dr. Pinhas as eye physicians and ophthalmologic surgeons, ¶¶ 10-11, 13-15.

The plaintiff has clearly alleged sufficient facts to plead the existence of a conspiracy among independent entities. No more is required at the pleading stage.

2. Even Were This Court to Accord the Medical Staff and Individual Defendant Physicians Employee Status, the Defendants Have Independent Economic Interests and Are Therefore Legally Capable of Conspiring.

As a general rule, "individual officers, directors or agents within a single corporation, acting on behalf of that corporation, are considered incapable of conspiring with each other or with their corporation." *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 n.7 (9th Cir. 1979). However, if employees act for their own independent economic interests, and outside the interests of the corporation, they are legally capable of conspiring with each other and the corporation. *Motive Parts Warehouse v. Facet Enterprises*, 774 F.2d 380, 387 (10th Cir. 1985); *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Greenville Publishing Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-4 (4th Cir. 1974) (when employees have competitive interests apart from the corporation, the courts have found the existence of conspiracy).

Plaintiff's complaint alleges the type of independent economic stake sufficient to confer the ability to conspire. *Tiftarea Shopper, Inc. v. Georgia Shopper, Inc.*, 786 F.2d 1115, 1118 (11th Cir. 1986); *Motive Parts*, 774 F.2d at 387-88. The complaint alleges that individual members of the Medical Staff, who compete with Dr. Pinhas, will benefit by obtaining the eye care and ophthalmologic surgery patients that would otherwise have been patients of the excluded competitor, Dr. Pinhas, ¶ 122. In addition, the complaint alleges an independent interest of the doctors and the hospital staff in ensuring the continuation of Midway's assistant surgeon program, ¶ 124. Through their boycott of Dr. Pinhas for his refusal to employ surgeons for procedures not requiring such assistance, defendants were pursuing individual financial interests solely distinct from, and to a degree antagonistic to, those of the hospital, which would be best served by eliminating unnecessary or redundant surgical personnel and by complying with Medicare regulations. Thus, the plaintiff has alleged substantial interests of the defendants which are separate and independent from that of the hospital. The defendants' arguments to the contrary must be rejected.

3. Lawyers May be Antitrust Conspirators.

Defendants argue Mr. Kadzielski and Weissburg & Aronson ("W&A") should be dismissed because these defendants acted merely as agents of the remaining defendants. However, a principal and agent can conspire if the agent materially aided the accomplishment of the scheme with knowledge of the anticompetitive purpose of the plan. *Albrecht v. Herald Co.*, 390 U.S. 145, 150, 88 S.Ct. 869, 871 (1968); see also *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1265-66 (8th Cir.), cert. denied, 449 U.S. 1063 (1980). *Tillamook Cheese & Dairy Ass'n v. Tillamook County Cream-*

*ery Ass'n*, 358 F.2d 115 (9th Cir. 1966), establishes that an attorney acting in concert with his client is not immunized from antitrust liability. The court held that when the attorney goes beyond the role of legal advisor and "acting by himself or jointly with others, makes policy decisions for the corporation, then he subjects himself to liability. . . ." <sup>9</sup> *Id.*

The complaint alleges that W&A retained Mr. Posell as hearing officer because Mr. Posell ensures that such committees achieve the results that W&A and its clients desire, ¶ 47; W&A had improper ex parte contacts with both Mr. Posell and the hearing panel, ¶¶ 53-55; and W&A ordered its court reporters to delay producing a transcript of the peer review proceedings, so that Dr. Pinhas could not use it in preparing his cross-examination, ¶ 72.

The complaint alleges sufficient independent misconduct by W&A from which this Court may infer that W&A stepped outside its legal advisory role and became an active participant in formulating and implementing defendants' anticompetitive scheme. Defendants' factual assertion that W&A was merely the defendants' agent fails to accept the complaint's allegations as true.

#### E. Plaintiff Has Alleged a Per Se Unlawful Group Boycott Whose Anticompetitive Effects Are Presumed.

Plaintiff alleges a per se unlawful boycott whereby defendants conspired to deny or restrict the staff privi-

<sup>9</sup>To maintain a cause of action against an attorney, "the plaintiff must plead . . . that the defendant attorney exerted his power and influence so as to direct the corporation to engage in the complained of acts for an anticompetitive purpose." *Brown v. Donco Enterprises, Inc.*, 783 F.2d 644, 646-47 (6th Cir. 1986). It is enough that the attorney became an active participant in formulating policy decisions with his client to restrain competition. *Id.* at 646.

leges of Dr. Pinhas, a competitor, at Midway Hospital. Defendants' argument is that plaintiff has failed to allege that defendants' conduct has had anticompetitive effects. However, once a plaintiff demonstrates that the defendants' conduct falls within a per se category, no allegation or proof of anticompetitive effect is required. The anticompetitive effects are presumed. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S.Ct. 705, 709 (1959).

The Supreme Court's decision in *FTC v. Indiana Federation of Dentists*, 107 S.Ct. 2009 (1986), makes clear that even under the rule of reason, horizontal agreements to boycott a competitor are presumptively anticompetitive. *Id.* at 2018. It is the defendants' burden to show some countervailing competitive benefit from the restraint. *Id.* The plaintiff has therefore pleaded anticompetitive effect under either standard for antitrust liability.

To demonstrate a per se unlawful group boycott, the plaintiff must allege that the defendants possess sufficient market power or that defendants control access to a facility necessary to enable the boycott victim to compete. *Id.* Plaintiff's complaint alleges that the defendants control plaintiff's access to hospital staff privileges, not only at Midway Hospital but also at other hospitals. Defendants exercise this control by virtue of the reporting requirements for decisions to terminate or restrict a physician's staff privileges imposed by both HCQIA and California law, ¶¶ 83-84, 90-101.

Plaintiff alleges that defendants have threatened and continue to threaten to file reports pursuant to federal and California law concerning Dr. Pinhas, ¶ 93. Any such reports will be distributed to other hospitals, who are obligated to request such reports for physicians whose staff privileges are being renewed or who seek privileges,



¶¶ 100-02. The complaint further alleges that after the decision in *Elam v. College Park Hosp.*, 132 Cal.App.3d 332, 183 Cal.Rptr. 156 (1982), hospitals in California commonly deny admission to the hospital staff to a physician whose report casts any doubt on his competency, ¶ 103. Therefore, defendants effectively control Dr. Pinhas' ability to secure staff privileges at other hospitals, the facilities he needs to compete as an eye physician and ophthalmologic surgeon, ¶¶ 124-25.

#### F. Plaintiff Has Alleged Antitrust Injury.

Defendants' last argument, a total mischaracterization of plaintiff's claim, is that plaintiff has failed to plead proper antitrust injury. Defendants assert that the only injuries claimed by plaintiff are based on: violation of plaintiff's rights to fair procedure or due process; violation of plaintiff's rights to a timely transcript; and violation of plaintiff's rights to unintimidated witnesses. Defendants' Brief at 19. So described, defendants then assert that these rights are not protected by the antitrust laws.

Contrary to this gross mischaracterization, plaintiff's complaint alleges that the boycott resulted in a lessening of competition in the market for ophthalmologic surgery by foreclosing Dr. Pinhas' market participation, ¶ 122. Such a reduction in competition constitutes the very kind of injury which the antitrust laws seek to prohibit. The alleged procedural irregularities focused on by the defendants are merely enabling devices to effectuate defendants' anticompetitive group boycott.<sup>10</sup> Had the

<sup>10</sup>Defendants' reliance on *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613 (1985) is misplaced. Concededly, that decision held that if the defendants' conduct does not violate § 1, the failure to afford the plaintiff

defendants boycotted Dr. Pinhas without using peer review, their unlawful restraint would still violate the antitrust laws. As plaintiff has alleged proper antitrust injury, the defendants' argument to the contrary must be denied.

#### G. Abstention From Antitrust Claim is Improper Where Federal Courts Have Exclusive Jurisdiction.

Abstaining from exercising jurisdiction in cases where the federal courts have exclusive jurisdiction defeats the legislation. *Key v. Wise*, 629 F.2d 1049, 1059 (5th Cir. 1980), *cert. denied*, 454 U.S. 1103, 102 S.Ct. 682 (1981). It provides the aggrieved with no forum for adjudication of his claim. In the instant case, Sherman Act claims are vested exclusively in the federal courts. *Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440, 40 S.Ct. 385 (1920); *General Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 287, 43 S.Ct. 106 (1922). See also *Union Oil Co. v. Chandler*, 4 Cal.App.3d 716, 84 Cal.Rptr. 756 (1970), confirming that California state courts have no jurisdiction over federal antitrust claims. This Court may not turn away Dr. Pinhas' antitrust claim.

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procedural protections is irrelevant. The plaintiff's complaint, however, does not claim that the lack of procedural protections associated with the defendants' peer review activities constitute the actionable conduct. Thus, the rule of *Northwest Stationers* is not implicated in the present case.

## III.

THE CIVIL RIGHTS ACTIONS<sup>11</sup>

## A. The § 1983 Claim.

The allegations necessary to maintain a § 1983 civil rights action are that defendant (1) acted under color of state law and (2) deprived plaintiff of a right, privilege or immunity protected by the Constitution. *Cohen v. Norris*, 300 F.2d 24, 30 (9th Cir. 1962) (en banc).

## 1. Color of State Law.

In order to show that defendants were acting "under color of state law" it is not necessary to allege that the action taken was authorized by the state; however, facts must be stated showing that defendants were clothed with authority of the state and were purporting to act thereunder. See, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598 (1970);<sup>12</sup> *Marshall v. Sawyer*, 301 F.2d 639 (9th Cir. 1962).

Unlike defendants who of course find no "state action" resulting from general regulation, *Freier v. New York Life Ins. Co.*, 679 F.2d 780, 783 (9th Cir. 1982) ("The mere fact that a business is regulated by state law or agency

<sup>11</sup>HCQIA, § 11111(a)(1) specifically recognizes that its immunity does not protect against actions brought pursuant to 42 U.S.C. §§ 1983 and 1985.

<sup>12</sup>The continued vitality of *Adickes* is proved by the Court's reliance on its holding in *Lugar v. Edmondson Oil Co. Inc.*, 457 U.S. 922, 941, 101 S.Ct. 2744, 2756 (1982). There, a § 1983 claim against private persons, causing a state official to seize plaintiff's property pursuant to a constitutionally suspect attachment statute, was upheld. There, as here, there is joint participation, pursuant to statutes which cause harm to Dr. Pinhas.

does not convert its dealing to acts 'under color of state law.'"), here there is state regulation covering specifically the very points at issue. The State requires peer review, and failure to have peer review may cost a hospital's state license (22 Cal. Admin. Code § 70701, et seq.). The State requires that peer review proceedings be kept confidential (Cal. Evid. Code §§ 1156 and 1157). Like the acts of state officials prosecuting and adjudicating matters, the State provides a broad general immunity to participants in peer review including witnesses (Cal. Civ. Code § 43.7). The State not only provides judicial review but the jurisdictional statutes makes specific provisions regarding hospital peer review proceedings (Cal. Code Civ. Proc. § 1094.5). The State accumulates information regarding physicians adversely affected by peer review and uses the mandatory 805 Reports for its own investigations (B&P Code § 805). Most significantly, however, what distinguishes this case from every other reported decision is that the State under compulsion distributes this information to other hospitals, health care service plans and medical care foundations (B&P Code § 805.5).<sup>13</sup> Less state involvement has supported a finding of private persons acting under "color of state law."

In *Marshall v. Sawyer*, *supra*, the state of Nevada published and distributed a "black book" to casinos listing the names of unsuitable persons. It transmitted this "black book" with a suggestion that casinos preclude such persons from entering gambling establishments. One John Marshall, so excluded, brought a § 1983 action against the state and casino's operators. The court held that there was sufficient nexus between the State and the

<sup>13</sup>Under HCQIA the State is required to collect and distribute similar reports from Hospitals in order for the Hospitals to comply with HCQIA, 42 U.S.C. § 11133, et seq.



casino operators' action, the distribution of the names and the control over licensure of the casino's operations that plaintiff stated a § 1983 claim against the casino operators:

"The defendants' conduct was engaged in under color of state law if they were clothed with authority of the state and were purporting to act thereunder, whether or not the conduct complained of was authorized, or indeed even if it was proscribed by state law." *Marshall, supra*, at 646.

Distribution of adverse information distinguishes this case from all the cases cited by defendants. Distribution of adverse information involves the State of California in the entire peer review process. Defendants do not cite, and cannot cite, any case which involves distribution of adverse information. No case interprets the effect of § 805.5 of the B&P Code and § 423 of HCQIA. Those statutes involve non-state defendants in sufficient state activities to state a claim for relief under § 1983. The acts of listing John Marshall in Nevada's "black book" or posting Grace Constantineau's picture in Wisconsin's liquor stores, *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971), are indistinguishable from causing distribution of Dr. Pinhas' name by listing him with BMQA pursuant to §§ 805 and 805.5 and 42 U.S.C. § 11133; each involves similar state action.

No court has yet determined that the State's involvement in accordance with B&P §§ 805 and 805.5 does not constitute "state action" for a § 1983 or § 1985 claim. Plaintiff continues to cite *Patrick, supra*, for the notion that if there is sufficient "state action" to invoke an antitrust immunity, the same facts are sufficient to sustain a finding of "state action" in the civil rights context.

The regulatory scheme set forth in *Patrick*, as far as it goes, is indistinguishable from the California scheme, except that Oregon has *less* state activities. Oregon has no "dissemination statute" like California's (B&P Code § 805.5).<sup>14</sup>

## 2. Due Process.

Dr. Pinhas' due process rights were violated when his medical staff privileges were summarily suspended on April 13, 1987, absent any notice and without any opportunity for hearing, ¶ 29. Dr. Pinhas' rights were violated. Defendants, more than a month thereafter, afforded Dr. Pinhas a "hearing", without sufficient disclosure of the charges against him, with a biased hearing officer, a biased hearing panel, interfered and threatened his witnesses, precluded him from calling hospital witness, and precluded him from being represented or even *consulting* retained counsel, ¶ 37.

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<sup>14</sup>The so called trilogy of "doctor cases" relied upon by defendants are not dispositive of the state action requirement. In *Aasum v. Good Samaritan Hospital*, 542 F.2d 792 (9th Cir. 1976), no argument was made, nor did the court consider, whether peer review proceedings supervised by the state, and provided under mandatory regulation, constituted state action.

Neither *Ascherman v. Presbyterian Hospitals*, 507 F.2d 1103 (9th Cir. 1974) nor *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975), is dispositive or addresses the issues raised herein. Nonetheless, Judge Duniway, concurring in *Ascherman*, said:

"Presumably, although we need not so decide, if the hospital took some action under applicable state regulations, that action would be 'state action'." 507 F.2d at 1105.

a. Due Process Guarantees the Right to Retained Counsel.

Research discloses no federal case which squarely decides the issue of whether due process requires the right to retained counsel at hospital disciplinary proceedings. State law is in conflict. In New Jersey, the right to retained counsel is guaranteed, *Garrow v. Elizabeth General Hospital*, 79 N.J. 549, 401 A.2d 533 (1979). In California, as long as the hearing panel has discretion to decide, the courts hold no due process violation exists for the exclusion of retained counsel. *Anton v. San Antonio Comm. Hospital*, 19 Cal.3d 802, 140 Cal.Rptr. 442 (1977). HCQIA is instructive.<sup>15</sup>

HCQIA provides that "a health care entity is deemed to have met the adequate notice and hearing requirement . . . if . . . the physician involved has the right . . . to representation by an attorney or other person of the physician's choice . . ." 42 U.S.C. § 11112(b) (3) (C) (i). By the passage of HCQIA with its list of due process rights, 42 U.S.C. § 11112, et seq., Congress determined that due process requires, among other things, *retained counsel at a medical peer review proceeding*. The reason is simple. As set forth in Section 2f, *infra*, Dr. Pinhas has a property interest in the outcome of these hearings. Under HCQIA, §§ 805 and 805.5 the government uses the result of these hearings for the purpose of accumulating information about physicians and *disseminating* this information to others. This act of government, as Congress recognized,

<sup>15</sup>The application of HCQIA is conditional in that a hospital may secure antitrust immunity by full compliance with HCQIA. What distinguishes HCQIA from California's B&P Code, §§ 805 and 805.5, is that the 805 Report and the dissemination of the 805 Report is mandatory. As such the right to retained counsel is essential to comply with due process of law.

now requires that the hearing reach a result *only* after the physician has been given due process of law, including right to counsel.<sup>16</sup>

Therefore, Dr. Pinhas was entitled to, but was wrongfully denied, the right to be represented by retained counsel.

b. Due Process Guarantees an Unbiased Hearing Panel and Hearing Officer.<sup>17</sup>

Two members of Dr. Pinhas' hearing panel are ophthalmologists, in direct economic-competition with Dr. Pinhas, ¶ 38. Defendants also selected a hearing officer who, with his law firm, brings in results consistent with the desires of hospital counsel, ¶ 47.<sup>18</sup> As such, defendants selected a tainted panel in violation of the due process clause.

Any person with a "substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437 (1927); *Commonwealth Coatings Co. v. Continental Cas. Co.*, 393 U.S. 145, 89 S.Ct. 337 (1968); *Ward v. Monroeville*, 409 U.S.

<sup>16</sup>A right to counsel is also mandated by decisional law in analogous contexts. In *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 101 S.Ct. (1981); *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976).

<sup>17</sup>HCQIA, § 11112(b) (3) (A) (ii), recognizes that the hearing officer should be unbiased and that the panel should not be composed of competitors, § 11112(b) (3) (A) (iii).

<sup>18</sup>Dr. Pinhas, concerned that Midway might appoint a biased hearing officer, in his demand for hearing (¶ 33, Exhibit "E") "request[ed] a hearing officer who is a retired judge of the Superior Court, or, in the alternative, someone whose impartiality cannot be questioned." That request was denied. See ¶¶ 37-38 and Ex. "F" thereto.



57, 93 S.Ct. 80 (1972); *Aetna Life Insurance Company v. La Voie*, 106 S.Ct. 1580 (1986). The principle applies to administrative hearings and judges, including the hearing officers. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689 (1973).

Here, the potential of a biased and prejudiced hearing panel and hearing officer is patent. Defendants appointed a panel consisting of ophthalmologists in active economic competition with plaintiff, and members of defendants' own medical staff, physicians subject to the control, persuasion and undue influence of defendants, and a hearing officer known to do defendants' bidding, ¶ 37-47.

c. Due Process Guarantees the Right to Call Witnesses.<sup>19</sup>

Notice and an opportunity to be heard are meaningless rights unless there is a power to compel witnesses, especially witnesses in the control of the defendants here. Dr. Pinhas sought to call the persons bringing the charges, defendant Dr. Lurvey and the person signing the charges, Mr. Feldman, but the hospital refused to permit them to be called or to compel, although it was within their power to do so, their attendance at the hearing, ¶ 63. Cf., *Keener v. Tennessee*, 281 F.Supp. 964, 971 (E.D. Tenn. 1968) ("[N]othing short of a new trial could remedy the error committed by the denial of process for witnesses.")

<sup>19</sup>HCQIA, § 11112(b)(3)(C)(iii), sets forth that the right to call witnesses is required for due process.

d. Due Process Guarantees Adequate Notice.<sup>20</sup>

Defendants deprived Dr. Pinhas of any real opportunity to prepare for the hearing, denying him "notice" which is a key element of due process. Procedural due process requires that parties are entitled to be heard at a meaningful time and in a meaningful manner. *Orloff v. Cleland*, 708 F.2d 372, 379 (9th Cir. 1983).

The May 7 Notice of Hearing contained charges in broad, general terms. It then listed approximately 128 patient charts that allegedly supported the charges. That was the "notice" given to Dr. Pinhas, Compl. Ex. "F". Dr. Pinhas' objections to the Notice, Comp. Ex. "G", and a motion for full disclosure of all charges against him, Comp. Ex. "J", were denied.

e. Due Process Guarantees the Right to Cross-Examine and Confront Witnesses.<sup>21</sup>

The constitutional right to confrontation and cross-examination cannot be doubted. Indeed, the Bylaws of Midway provide for confrontation and cross-examination. However, it is a denial of a constitutional magnitude to provide for the "right" of confrontation and cross-examination and to deny the means to effectuate those rights. No detailed study is necessary to determine why the right to cross-examination, even if it were not included in the Bylaws, would be required by due process. The right to cross-examination is essential to the fact finding process of adversary proceedings — the great engine of truth as it was once called by Professor Wigmore. "And the right to

<sup>20</sup>HCQIA, § 11112(b)(1) and (b)(2), recognizes that adequate notice is an element of due process.

<sup>21</sup>HCQIA, § 11112(b)(3)(C)(iii), recognizes that confrontation and cross-examination are required for due process.

a hearing embraces an 'adequate opportunity... to defend....' *Louisville and Nashville R.R. Co. v. Schmidt*, 177 U.S. 230, 236, (1900)." *Christhilf v. Annapolis Emergency Hospital Ass'n., Inc.*, 496 F.2d 174, 178 (4th Cir. 1974).

The right of a litigant to defend includes: "the right to present evidence in his behalf, the right to rebut evidence against him, and the right of cross-examination." *Id.* at 179. The due process clause "grants the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148 (1982). Most significantly, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269, (1970); *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959).

By precluding counsel's participation at any level, defendants are giving that right with one hand and making it impossible to exercise with the other.

f. Dr. Pinhas Has a Property Interest in Maintaining His Medical Staff Privileges.

Dr. Pinhas has a *property* interest in maintaining his medical staff privileges. A wrongful dissemination of a report pursuant to HCQIA and § 805.5 would have a devastating effect upon Dr. Pinhas' staff privileges at the hospital, see *Haller v. Burbank Comm. Hospital Foundation*, 149 Cal.App.3d 650, 197 Cal.Rptr. 451 (1983). As previously explained, any erroneous report would be available to hospitals that currently, or in the future, will have given Dr. Pinhas medical staff privileges. An erroneous report is just as devastating to Dr. Pinhas' good name and reputation, as in *Wisconsin v. Constantineau*, 400 U.S.

433, 91 S.Ct. 507 (1971), where the court held that posting a notice in a retail liquor stores that sales or gifts of liquor to someone was forbidden without notice was a breach of that person's due process. The court stated:

"...The only issue present here is whether the label or characterization given a person by 'posting', though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the *private interest* is such that those requirements of procedural due process must be met." (Emphasis added.) *Id.*, 400 U.S. at 436, 91 S.Ct. at 509. See also, *Marshall v. Sawyer*, 301 F.2d 639 (9th Cir. 1962).

The result is the same, whether there is no due process or defective due process. One's good name or reputation should not be tarnished by government action, and if it does occur, it should occur only after Dr. Pinhas is afforded his rights that are guaranteed by due process. It is the reporting requirements of HCQIA and §§ 805 and 805.5 that plaintiff contends are additional reasons for requiring that he be accorded full due process.

B. The Claim Under § 1985.

This claim rises or falls with this Court's determination of the "state action" issue to be decided herein. Any insufficient allegations can be cured by an amendment to the complaint.

C. This Court May Not Abstain From Exercising Its Jurisdiction Over the Civil Rights Action Since the State is Not a "Working Partner" With Defendants.

"'[A]bstention from the exercise of federal jurisdiction is the exception, not the rule.'" *McIntyre v. McIntyre*,



771 F.2d 1316 (9th Cir. 1985). Absent 'an important countervailing interest,' (citation), federal courts have 'the virtually unflagging obligation . . . to exercise the jurisdiction given to them,' (citation)." *McIntyre* at p. 1319. "There is no discretion to abstain in a case that does not meet the abstention requirements." *McIntyre* at p. 319. It must further be noted that abstention in civil rights cases is generally disfavored. See *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433 (1963); *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116 (1965); *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323 (1974).

Defendants ask this Court to invoke the "Burford abstention doctrine" to this case. *Burford v. Sun Oil Company*, 319 U.S. 315, 63 S.Ct. 1098 (1943).<sup>22</sup> The *Burford* abstention doctrine is best characterized as abstention by the federal court in cases which involve basic matters of state policy and where the state is a "working partner" in effectuating review of state administrative orders. *Burford*, *supra*. As set forth below, this case is not a case where the court may abstain from exercising jurisdiction.

#### 1. Issues of Federal Health Care Policy are at Stake.

Defendants assert that the action "raises important and sensitive issues of state care health policy", defend-

<sup>22</sup>The defendants have not requested that this Court consider the "Pullman Doctrine" (*Railroad Commission v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643 [1941]), and with good reason. It could not prevail under the "three prong test" utilized in the Ninth Circuit. See *Cotton v. Spokane School District No. 81*, 498 F.2d 840, 845 (9th Cir. 1974). If the language of the statute is "crystal clear", like here, abstention is inappropriate. See *Pue v. Sillas*, 632 F.2d 74 (9th Cir. 1980).

ants' Brief at p. 9. The implementation of HCQIA totally undercuts this argument — HCQIA recognizes and establishes that there is a federal health care policy requiring that the standard of health care be consistent nationwide. By enacting HCQIA, Congress intended to create a national reporting and data base which could be used by hospitals to assess the professional competence of a practitioner, regardless of geographic location. Thus, any state policy at stake supplements, not supplants, this federal policy.

#### 2. Working Partners.

The Supreme Court justified abstention in *Burford* on the theory that the state court was a "working partner" with the state administrative agency in the business of creating a highly specialized regulatory system for a purely local industry. *Burford*, 319 U.S. at 326, 63 S.Ct. at 1106. The Ninth Circuit has consistently held that absent a statutory scheme which vests administrative review in one set of courts, the *Burford* doctrine does not apply. See, for example, *Rancho Palos Verdes Corp. v. Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976);<sup>23</sup> *Knudsen Corp. v. Nevada State Dairy*, 676 F.2d 374 (9th Cir. 1982). The Ninth Circuit has been cautious in overextending the limited restraint provided by the *Burford* doctrine. *International Brotherhood of Electrical Workers v. Public Service Comm.*, 614 F.2d 206, 211 (9th Cir. 1980).

There is no state administrative agency or agency order subject to review. California has not concentrated challenges to peer review proceedings in any specific court.

<sup>23</sup>The court ultimately determined that the case was appropriate for the *Pullman* abstention doctrine. At p. 1096.

There is no elaborate scheme of review, agency or otherwise. Thus, *Burford* does not apply.

It is also significant that the Supreme Court in *Burford* supported its decision by determining that the state "courts can give fully as great relief, including temporary restraining orders, as the federal courts." The Supreme Court had effectively determined that the relief sought in the federal court was a mirror image of what a state court could grant. Indeed, in *Burford* all the plaintiff sought was equitable relief — to enjoin the enforcement of an order. That same relief was available to the plaintiff in the state court. However, in the instant case, the state court cannot grant Dr. Pinhas comparable relief. Dr. Pinhas may not yet file a petition for a writ of mandate, C.C.P. 1094.5. Defendants, if Dr. Pinhas commences a damage or injunctive action in state court, will seek to have it dismissed as premature, see Defendants' Brief, p. 1, where defendants assert that Dr. Pinhas is precluded from asserting any cause of action in the state courts against any of the defendants until final determination of the administrative proceedings. Defendants rely here and would rely in the state court on *Westlake Community Hospital v. Superior Court*, 17 Cal.3d 465, 131 Cal.Rptr. 50 (1976).

These facts, that there is no pending state administration proceeding, there is no state judicial proceeding, and there is no plain or speedy state remedy available to Dr. Pinhas, also distinguish defendants' misplaced reliance on *Pennzoil, Inc. v. Texaco, Inc.*, 107 S.Ct. 1519 (1987) and *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971).

## IV.

## PLAINTIFF HAS ADEQUATELY PLED A DECLARATORY RELIEF CAUSE OF ACTION

Defendants have moved to dismiss the First Claim for Relief, not on the ground that it fails to state a claim but, rather, that they should not be participants in litigation over the constitutionality of §§ 805 and 805.5 of the B&P Code and § 423 of the HCQIA, 42 U.S.C. § 11111, et seq. Defendants' participation in the operation of those two statutes is substantial. Pursuant to § 805, the chief of the medical staff and the chief executive officer are required to prepare and file reports. Although there is no discretion in the filing of a report there is a "determination" as to whether a report falls within the criterion set forth in the statute.<sup>24</sup> Defendants, the chief executive officers and chief of medical staff have sole discretion as to what is contained in the "statement detailing the nature of the action, its date, and all of the reasons for and circumstances surrounding the action." Indeed, in connection with this matter, defendant Kadzielski threatened that if Dr. Pinhas would resign, the § 805 report would be "light", but if he challenged the matter in a hearing, the hospital, of course, could make the report "heavy" and "really go after him".

<sup>24</sup>There is much dispute between "disciplined" doctors and hospitals as to whether staff privileges have been "restricted" at all even if conditions have been placed on privileges; have been restricted for a cumulative total of 45 days; have been restricted within one or more than one calendar year; and whether the action is as a result of a "medical disciplinary cause or reason". Different hospitals take different views as to whether an 805 Report needs to be made when initial "discipline" is imposed or after all appeals have been exhausted. Unfortunately, the resolution of all of these issues is left to the discretion of the hospitals and its lawyers.



To encourage complete discretion in making the reports, the state has protected the defendants from incurring not only civil, but also *criminal* liability as the result of the making of any 805 Report.<sup>25</sup>

Upon the filing of an 805 Report, defendants thereafter are involved as a result of § 805.5. The § 805 Report that defendants file, no matter how abusive, no matter how incorrect, no matter how outrageously achieved, is disseminated to any health care service plan, medical care foundation or hospital that requests it. All hospitals to which plaintiff applies or re-applies for medical staff privileges are required to request the 805 Report. Failure to make a request is a misdemeanor. A hospital may not grant or renew staff privileges for "30 working days" following its request. BMQA distributes "a copy of any report made pursuant to § 805" without any editing. Contrary to defendants' assertions, their actions are not "purely ministerial" and plaintiff has sought, and continues to seek, to enjoin defendants from complying with §§ 805 and 805.5 (see paragraph 1(e) of Plaintiff's Proposed Temporary Restraining Order and Preliminary Injunction) as well as § 423 of HCQIA, because failure to do so causes plaintiff substantial and irreparable injury, *Haller v. Burbank Comm. Hospital, supra*. Indeed, if one is to argue over who has ministerial functions, it is the state that has ministerial functions, especially in light of the fact that under HCQIA a hospital can decide whether it wishes to participate in the invitation to have immunity.<sup>26</sup>

<sup>25</sup>It is, of course, a misdemeanor to fail to file an 805 report.

<sup>26</sup>Because defendants have not chosen to deal with the constitutional issues raised, only the procedural issues relating to a determination of constitutionality, plaintiff has not further elaborated his constitutional challenge to those statutes.

and under §§ 805 and 805.5, the state must distribute the hospital's 805 Report regardless of its content.

## V.

### DEFENDANTS' REQUEST FOR SANCTIONS

The proper inquiry under a request for sanctions under Rule 11 is whether the "pleading, motion or other paper" is "well-grounded in fact, that it is warranted by existing law or a good faith argument for an extension, modification or reversal of existing law, and that it is not filed for an improper purpose." *Golden Eagle Distributor Corp. v. Burrows Corp.*, 801 F.2d 1531 (9th Cir. 1986). The court is to address whether a party utilized "frivolous filings" or the use of judicial procedures as a tool for "harassment". *Zaldavar v. City of Los Angeles*, 780 F.2d 823 (9th Cir. 1986). An objective standard of reasonableness is applied. *Zaldavar*, 780 F.2d at 830-31. The Ninth Circuit has repeatedly made the point "that sanctions should not be used to chill an attorneys enthusiasm or creativity in pursuing factual or legal theories." *Hudson v. Moore Business Forms*, 87 D.J. Dar. 5832.

This Court has been requested to rule upon issues never before decided. While defendants may be upset over the prospect that liability may attach to their conduct, this Court must not confuse that issue with its duty to hear and determine novel issues placed before it, even if it will extend liability to those who might have been protected prior to HCQIA.

## VI.

## CONCLUSION

For the foregoing reasons, plaintiff Simon J. Pinhas respectfully requests that this court deny defendant's Motion to Dismiss in its entirety and order defendants to answer.

Respectfully submitted,

DATED: September 8, 1987

LAWRENCE SILVER  
A LAW CORPORATION  
LAWRENCE SILVER  
AND  
BLECHER AND COLLINS  
PROFESSIONAL CORP.  
MAXWELL BLECHER  
ALICIA ROSENBERG

BY: (signature)  
LAWRENCE SILVER  
*Attorneys for*  
*Plaintiff Simon J.*  
*Pinhas, M.D.*

(PROOF OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

**DEFENDANTS' REPLY TO OPPOSITION TO MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

[F.R.Civ.P. Rules 11, 12(b)(1), and 12(b)(6)]

Date: September 21, 1987,

Time: 10:00 a.m., Courtroom: 255



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## I. INTRODUCTION

Plaintiff struggles to maintain his civil rights and antitrust claims. The attempt is made to make this case a "first impression" type of litigation, to point to facts which are not pled in the Complaint and to generally obfuscate antitrust exemptions. As this reply brief points out: (1) nothing in the Health Quality Improvement Act of 1986 narrows the application of the state action doctrine interpreted in *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986); (2) the interstate commerce cases applicable in this circuit militate against assumption of jurisdiction; (3) plaintiff's attempt to join the lawyers as defendants must be rejected even under the cases plaintiff cites; and (4) the medical staff claims involved are not civil rights claims, but raise only garden variety medical staff issues. For these reasons, the Motion to Dismiss should be granted.

## II. PLAINTIFF'S ANTITRUST CLAIMS

### A. The Antitrust State Action Doctrine Is Not Preempted By The Health Quality Improvement Act Of 1986.

Plaintiff argues at length (Opposition, p. 2-5) that the antitrust state action doctrine, as recently interpreted in *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986), has been preempted, at least in the context of medical staff privilege cases, by the immunity provisions contained in the Health Quality Improvement Act of 1986 (P.L. 99-660) 42 U.S.C. §11101, et seq. ("Act"). This argument, however, disregards (and plaintiff does not cite) the plain language of Section 415(a) of the Act which states.

"Except as specifically provided in this part, nothing in this part shall be construed as changing the liabilities or immunities under law." 42 U.S.C. § 11115(a)

Moreover, plaintiff acknowledges that the immunity afforded under the Act is narrower than that potentially available under the state action doctrine (*e.g.*, the Act requires reasonable belief and good faith whereas the state action doctrine can apply even in the absence of good faith by the defendants). Thus to argue, as plaintiff does, that the Act with its narrower protections has preempted application of the state action doctrine in the context of medical staff peer review proceedings contradicts an express purpose of the statute.

Both plaintiff and defendants recognize that the statute was enacted in response to filing of numerous antitrust cases against physicians participating in effective professional peer review. In Section 402 of the Act, the Congress finds the following:

"... (4) The threat of private money damage liability under Federal Laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101.

It simply does not make sense to construe the Act, whose purpose is to foster effective professional peer review and to curtail the number of financially crippling antitrust lawsuits against participating physicians, as providing a more restrictive and narrow protection than might otherwise exist under existing antitrust law, *i.e.*, the state action doctrine. To the contrary, a consistent interpretation of the purpose, provisions and legislative history of the Act is that it was meant to supplement any existing



immunities, including the antitrust state action doctrine, rather than to supplant them. The state action doctrine, consistent with Section 415(a) of the Act, [42 U.S.C. § 11115(a)] can provide immunity in peer review antitrust litigation where the specific provisions of the Act cannot be invoked.

B. The Complaint Is Insufficient To Demonstrate The Required Nexus With Interstate Commerce For Sherman Act Jurisdiction

Plaintiff's acknowledges that, under *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 100 S.Ct. 502 (1980), Sherman Act jurisdiction must be established by a showing that the defendants' activities affect interstate commerce through their effect on plaintiff's interstate activities or by a showing that the defendants' activities themselves directly affect interstate commerce.

Plaintiff argues that his First Amended Complaint satisfies both of the alternative interstate commerce jurisdictional tests set forth in *McLain*. First he argues that his interstate activities alone are sufficient to invoke Sherman Act jurisdiction. Referring to Paragraphs 24-26 of his Complaint, plaintiff's opposition memorandum states that his practice has a "interstate character" and that he "receives substantial revenues from Medicare." (Opposing memorandum, Page 7 and 8). Yet, the referenced paragraphs in the Complaint, which deal with Midway Hospital's reaction to a Medicare program policy regarding reimbursement of assistant surgeons, do not allege that Dr. Pinhas received any Medicare revenues, much less specify the amount of any such revenues.

Even if, under unique circumstances, a single physician's practice could have a sufficient nexus with interstate commerce to provide a jurisdictional basis for an

antitrust case, Dr. Pinhas' claims do not present such a case. There is no allegation in the First Amended Complaint defining the number of out-of-state patients which Dr. Pinhas has serviced at Midway Hospital nor any allegation of the amount of revenues Dr. Pinhas receives from out-of-state sources.

To satisfy the alternative test set forth in *McLain*, — i.e., that defendants interstate commerce are infected by the alleged illegal activity, Dr. Pinhas' opposition papers (p. 8 lines 11-12) state that defendants have "substantial interstate business activities and that defendants receive substantial revenue from Medicare, ¶¶ 24-26." These are the same paragraphs in the First Amended Complaint which Dr. Pinhas purportedly uses in support of his position that his activities have the requisite nexus with interstate commerce. Yet, a reading of those paragraphs do not contain an explicit allegation that defendants receive substantial revenues from Medicare (much less which of the specific defendants receive such revenues and the magnitude of any such revenues).

Even assuming defendants or at least some of them may receive revenues from the Medicare program, those revenues could not be materially affected by Dr. Pinhas' removal from the staff at Midway Hospital. At most, the extent of interstate commerce affected by the removal of Dr. Pinhas from staff is the number of out-of-state patients Dr. Pinhas currently serves and/or the amount of out-of-state revenues currently received by defendants for services specifically related to eye care and ophthalmic surgery.<sup>1</sup>

<sup>1</sup>Dr. Pinhas' bold assertion that termination or restriction of his staff privileges at Midway Hospital will, by virtue of mandatory government reporting requirements, prevent him from practicing medicine is preposterous. Even if such a proposition were true,

Consistent with *Hahn v. Oregon Physicians' Service*, 689 F.2d 840 (9th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983) and *Carey v. Daniel Freeman Memorial Hosp.*, 1984-1 Trade Cas. (CCH) ¶ 65,831 (C.D. Cal. November 22, 1983), this court should disregard any interstate commerce impact of the Hospital's overall activities and instead focus only on those hospital activities infected by the alleged violation (i.e., eye care and ophthalmic surgery).<sup>2</sup> Under this test, plaintiff must show that "as a matter of practical economics" the operation of the Hospital's eye care and ophthalmic surgery service has a not insubstantial effect on interstate commerce by affecting the number of eye surgeries performed in Los Angeles which, in turn, would affect the amounts of reimbursement, supplies and equipment, and the number of patients that would move across state lines.<sup>3</sup> Therefore, this court

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jurisdiction under the Sherman Act would exist only if such a result would "as a matter of practical economics, have a not insubstantial effect on interstate commerce." See *Palmer v. Roosevelt Lake Log Owners Assoc. Inc.*, 661 F.2d 1289, 1891 (9th Cir. 1981).

<sup>2</sup>Therefore, plaintiff's request (p.8, fn.7 of opposition) that he be entitled to conduct discovery on "the full scope and extent of defendants' activities in interstate commerce" is a request for irrelevant information and should be denied.

<sup>3</sup>Most federal courts faced with antitrust cases involving medical staff privileges have interpreted *McLain's* jurisdictional requirement as mandating a direct connection between the defendants' challenged conduct and interstate commerce. See generally, *Cruis v. Intermountain Health Care Inc.*, 637 F.2d 715 (10th Cir. 1980) (en banc); *Furlong v. Long Island College Hosp.*, 710 F.2d 922 (2nd Cir. 1983); *Weiss v. York Hosp.*, 745 F.2d 786 (3rd Cir. 1984), *cert. denied* 105 S. Ct. 1777 (1985); *Stone v. William Beaumont Hospital*, 782 F.2d 609 (6th Cir. 1986); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985); *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984); and *Shakowsky v. Harrison*, 755 F.2d 1432 (11th Cir. 1985), vacated on reh'g, 1985-2 Trade Cases (CCH) ¶ 66,888 (11th Cir. 1985).

need only consider the effect that the revocation of Dr. Pinhas' privileges has in connection with these components of interstate commerce. His pleading is grossly insufficient in this regard and, accordingly, his antitrust claim should be dismissed for lack of subject matter jurisdiction.

### C. The Complaint Is Insufficient To Plead An Antitrust Conspiracy

In his opposition (p.10, 11. 5-7), plaintiff refers to *Weiss v. York Hospital*, 745 F.2d 786, (3d Cir. 1984) *cert. denied*, 470 U.S. 1060 (1985) for the proposition that "a hospital medical staff is a combination of individual doctors and that the staff's action satisfies the conspiracy requirement of Section One." However, plaintiff fails to reveal that another key ruling of the *Weiss* case was that a medical staff is incapable, as a matter of law, of conspiring with its hospital. *Id.* at 817.

Other aspects of plaintiff's conspiracy allegations are also legally insufficient. First, Midway Hospital is incapable of conspiring with Summit Health, its parent. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731 (1984). Second, plaintiff acknowledges that Mr. Feldman is an employee of Summit and Dr. Lurvey is Chief of Staff of Midway Hospital.<sup>4</sup> Thus,

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In determining whether a physician's complaint satisfy the jurisdictional requirements of the Sherman Act, these courts have relied upon the effects of the challenged conduct on specific interstate activities such as the hospital's treatment of out-of-state patients; receipt of Medicare, Medicaid and other out-of-state insurance payments; and the purchase of medicines, equipment and medical supplies from out-of-state vendors.

<sup>4</sup>Moreover, plaintiff has alleged no independent economic interest of Mr. Feldman or Dr. Lurvey from that of Summit Health and/or



consistent with the holding of *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455 fn.7 (9th Cir. 1979), a case cited with approval by plaintiff, neither Mr. Feldman nor Dr. Lurvey, as agents of the hospital, are capable of conspiring with Midway Hospital (and/or Summit Health).

Third, plaintiff argues that his First Amended Complaint "alleges sufficient independent misconduct by W&A from which this Court may infer that W&A stepped outside its legal advisory role and became an active participant in formulating and implementing defendants' anti-competitive scheme." (Opposition, Pages 12-13).

In fact, plaintiff did not specifically plead that Weissburg and Aronson or Mr. Kadzielski participated in formulating the defendants' alleged anti-competitive policy or that Weissburg and Aronson motivated the defendants to engage in anti-competitive activities. In *Brown v. Donco Enterprises, Inc.*, 783 F.2d 644, 646-647 (6th Cir. 1986), cited by plaintiff in his opposition (P. 12, fn.9), the court affirmed the trial court's entry of summary judgment in favor of attorneys, where the complaint had alleged that the attorney engaged in such independent misconduct as conspiring with their client to file and threaten lawsuits so as to coerce, intimidate and compel plaintiffs and other franchisees to purchase exclusively from defendant, and actually drafted letters and threatened and filed lawsuits in furtherance of the illegal conspiracy. Mindful that "attorneys ordinarily act in response to their client's directives," the court refused to infer that counsel "stepped outside of its legal advisory role" and held that summary judgment was appropriate because the complaint did not *specifically* allege that the

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Midway Hospital. Nor has plaintiff alleged that Dr. Lurvey is a competitor of plaintiff.

attorneys served as active participants in formulating the policy, or that they in any way motivated the client to engage in litigation for anti-competitive purposes.

Similarly, Weissburg and Aronson (and its principal Mark Kadzielski) must be dismissed as defendants because plaintiff has failed to state a cause of action under the criteria of *Brown*.

Therefore, the only defendants who, even under the rubric of the *Weiss* case, are legally capable of conspiring are Drs. Reader, Macy, Salz, and Perlman, either among themselves or together with the Hospital. Even if these physicians have competing economic interests to Dr. Pinhas, plaintiff has not alleged any facts to demonstrate that these individuals had anything whatsoever to do with the initiation of the peer review proceedings against Dr. Pinhas. Absence such allegations, plaintiff's complaint is deficient for failure to specify any particulars of the purported conspiracy.

In summary, plaintiff's antitrust conspiracy allegations should be dismissed in their entirety because he has alleged a conspiracy among certain defendants legally incapable of conspiring and, even with regard to those defendants legally capable of conspiracy, his allegations are factually insufficient.

#### D. Plaintiff's Boycott Allegations Are Inadequate.

In his opposition, plaintiff clarifies his position that the alleged antitrust conspiracy is one that constitutes a "*per se* unlawful group boycott." Plaintiff correctly refers to the latest Supreme Court case which explained when the *per se* rule applies to group boycotts. In *F.T.C. v. Indiana Federation of Dentists*, 106 S.Ct. 2009, 2018, (1986), the Court reiterated that "the category of restraints classed as group boycotts is not to be expanded indiscriminately,

and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor . . ."

Plaintiff nowhere alleges that any of the defendants in the instant case enjoy market power. Plaintiff's depiction of the alleged impact of the mandatory government reporting requirements which result from a decision to terminate or restrict staff privileges is, at best, a strained attempt to position the defendants in the instant case with "market power". It is an attempt which this court should reject. As the Supreme Court said in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613, 2621 (1985), "The mere allegation of a concerted refusal to deal does not suffice [to warrant application of the *per se* rule] because not all concerted refusals to deal are predominantly anticompetitive."

If this court, consistent with defendants' position, rejects application of the *per se* rule, it should also reject plaintiff's contention (Opposition, p. 13, lines 14-17) that the alleged conspiracy between the defendants is presumptively anticompetitive such as to require defendants to come forth with proof of some countervailing competitive benefit from the alleged restraint. In support of his position, plaintiff refers to *FTC v. Indiana Federation of Dentists*, *supra* at 2018. Contrary to plaintiff's characterization, the Supreme Court's reference in that case to a defendant's burden to proffer a countervailing pro-competitive virtue was explicitly in the context of a horizontal agreement constituting a refusal to compete. Specifically, the Court, at 2018, said:

"A refusal to compete with respect to the package of services offered to customers . . . impairs the ability

of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services. [Citations omitted] — such an agreement limiting consumer choice by impeding the "ordinary give and take of the marketplace" . . . [citation omitted] cannot be sustained under the Rule of Reason." (Emphasis added.)

The Supreme Court went on to reference its earlier decision in *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948 (1984) to clarify that a naked restriction on price or output requires some competitive justification even in the absence of a detailed market analysis.

Since the alleged conspiracy by defendants in the instant case is not one involving either price or output restriction nor a refusal to compete, the allegations are subject to neither the *per se* rule nor a truncated rule of reason analyses. Rather, the sufficiency of plaintiff's pleading must be evaluated in the context of a traditional rule of reason approach where the "test of legality is whether the restraint imposed is such that it merely regulates and perhaps thereby promotes competition or whether it is such as it may suppress or even destroy competition. *Chicago Board of Trade v. United States*, 246 U.S., at 238, 38 S.Ct. at 244," quoted with approval in *F.T.C. v. Indiana Federation of Dentists*, 106 S.Ct. 2009, 2017 (1986). Since plaintiff had plead, at most, only an adverse economic impact on plaintiff's business revenue rather than on effect on competition in the market of ophthalmology services, plaintiffs' complaint is deficient.



As stated in defendants' moving papers, "no where does plaintiff allege an adverse affect on competition distinguished or distinguishable from the effects of plaintiffs' own medical practice.<sup>6</sup> Absent injury to competition, injury to plaintiff as a competitor will not satisfy the pleading requirement of Section 1." *Falstaff Brewing Company v. Stroh Brewing Company*, 628 F.Supp. 822, 827 (N.D.Cal. 1986), citing *Brunswick Corp. v. Pueblo Bowl-O-Matt, Inc.*, 429 U.S. 477, 488 (1977).

This court should heed the analysis of the Supreme Court in its *Northwest Wholesale Stationers* decision where the plaintiffs' expulsion from a cooperative buying arrangement consisting of its competitors was found unlikely to cause anti-competitive effects, unless the cooperative possessed market power or exclusive access to an element essential through effective competition. "Absent such a showing . . . courts should apply a rule-of-reason analysis." 105 S.Ct. at 2621.

As in the *Northwest Wholesale Stationers* case, Dr. Pinhas, in the instant dispute, has not been able to allege that defendants possess market power or exclusive access to an element essential to effective competition. Therefore, the sufficiency of plaintiff's First Amended Complaint must be read in the context of a case where plaintiff must proceed under a rule of reason analyses. In such a context, plaintiff must allege, with specificity, how competition in the market of "eye care and ophthalmic surgery in Los Angeles" is adversely affected. Plaintiff's First Amended Complaint is devoid of any such explanation and, accordingly, should be dismissed.

<sup>6</sup>Nor does Complaint ¶ 122 advance plaintiff's position. Its assertion that the defendant doctors "will have a greater share of the eye care and ophthalmic surgery in Los Angeles" is not sufficient to allege a demonstrable anti-competitive effect in that market.

### III.

#### PLAINTIFF'S CLAIMS REGARDING CIVIL RIGHTS ARE PATENTLY UNSUPPORTED BY ANY JURISDICTIONAL FACTS.

##### A. Plaintiff Still Fails To Demonstrate That This Court Has Subject Matter Jurisdiction In This Case.

Plaintiff's sole predicate for subject matter jurisdiction regarding these claims is the mere existence of California's statutory scheme governing hospital peer review proceedings. Plaintiff's arguments on the state statutory scheme were all rejected by this court in denying his application for a temporary restraining order in May. However, Plaintiff argues now in his opposition that state action exists because the California Business and Professions Code compels the collection and distribution of peer review information. See Business and Professions Code Sections 805 and 805.5. Plaintiff now claims, admitting that he has no case authority for the proposition, that the existence of this information distribution system, creates "state action" for purposes of federal jurisdiction in this case. Nothing could be further from the truth.

First, Section 805 of the Business and Professions Code serves simply as an information gathering and dissemination system regarding licensed healthcare professionals in California. That section requires the state agency to act as a collector and disseminator of information, and does not involve the state in making any judgments or interpretations of the information reported to it. To this extent the state is not "involved" in doing anything except acting as a conduit for information submit-

ted to it by private health facilities.<sup>7</sup> Thus, the action of

<sup>7</sup>Plaintiff cites two completely inapposite cases in support of his argument that dissemination of information like that contained on the Section 805 report gives rise to "state action" under the Civil Rights Laws. First, in *Marshall v. Sawyer*, 301 Fd.2d 639 (9th Cir. 1962), the Governor of Nevada, its Gaming Control Board, its Gaming Commission, individual members of the Board and Commission, and the private Nevada corporation which operated the Desert Inn Hotel and five employees of that corporation were sued under 42 U.S.C. § 1983 and 1985(3). The trial court dismissed the complaint as to all defendants, after only the state defendants moved to dismiss the complaint. The non-state defendants did not join in that motion nor did they appear as appellees before the Ninth Circuit. 301 F.2d at 643. Accordingly, their arguments, unlike those of moving defendants here, were not before the court. Moreover, the thrust of plaintiff's complaint was that the State of Nevada, through its state agencies (the Gaming Control Board and the Gaming Commission) promulgated a "black book" containing the names and pictures of persons designated as "undesirable" by them, all of which was done without notice or hearing to the persons so designated. Thus, there was no question that there was a state determination that included a "recital of the findings made by the state agencies and officials concerning the alleged undesirable character of identified individuals." 301 Fd.2d at 645 (emphasis added). In contrast, in the instance case, the State Board of Medical Quality Assurance, as noted, makes no "findings" and no "determination" whatsoever regarding the information it collects or disseminates. Furthermore, the determination of what to do with the information is not directed by the State of California, but is left up to the individual health facilities that request it. For all the above reasons, the *Marshall* case is inapplicable.

Likewise, plaintiff cites the case of *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971). That case involved a state statute which permitted designated persons to forbid the sale or gift of intoxicating liquors to anyone who "by excessive drinking" exhibited certain traits. Pursuant to this statutory authority, the Chief of Police of Hartford, Wisconsin, without notice or hearing to Ms. Constantineau, posted a notice in all retail liquor outlets in Hartford prohibiting the sale or gift of liquors to her for a period of one year. The suit was brought only against the Chief of Police, a governmental

the state as a passive receptor and disseminator of information does not create the "sufficiently close nexus" clearly required under the *Jackson v. Metropolitan Edison Company* case, 419 U.S. 345, 350 (1974); nor is the state "involved in the specific activity complained of" to give rise to federal jurisdiction. *Taylor v. St. Vincent Hospital*, 523 F.2d 75, 77 (9th Cir. 1975).

Second, were the requirements of Business and Professions Code Section 805 et seq. sufficient to constitute state action for purposes of federal civil rights violations, the actions of the several hundred private hospitals in the state of California in compliance therewith would instantly be converted into actions of the State. There is absolutely no authority for this proposition, which defies common sense. Indeed, all Ninth Circuit precedents cited by defendants confirmed this fact. See *Aasum v. Good Samaritan Hospital*, 542 F.2d 792 (9th Cir. 1976); *Watkins v. Mercy Medical Center*, 520 F.2d 894 (9th Cir. 1975); and *Ascherman v. Presbyterian Hospital of Pacific Medical Center, Inc.*, 507 F.2 1103 (9th Cir. 1974). Plaintiff cites no cases in the medical staff area from any jurisdiction where such a reporting and dissemination function is performed that "create" state action on this basis.

Third, as previously argued in detail in Defendants' Opposition to Ex-Parte Application for A Temporary Restraining Order (filed on May 26, 1987), the entire

official, and the State of Wisconsin thereafter intervened as a defendant on the injunctive phase of that case. 400 U.S. at 436, 91 S.Ct. at 509. Unlike the present case, the State through its own action had made a determination with regard to the individual, and no non-governmental parties were involved in the lawsuit. Accordingly, plaintiff cannot rely upon the holding of the *Constantineau* case for support here.



California statutory scheme, including but not limited to Section 805 *et seq.* of the Business and Professions Code, is established for the general purpose of promoting the work of peer review committees, and is thus analogous to funding subsidies and tax benefits that the state also may provide private hospitals. None of these laws authorize or require the State of California to participate in the deliberations of such peer review committees or to interject itself in those committees' decision-making process. See Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Ex-parte Application at Pages 5-7. Accordingly, just as neither funding subsidies nor tax benefits granted by the state confer upon private hospitals the status of state action, neither does the encouragement of the peer review process provided by such sections as 805 and 805.5 in the Business and Professions Code.

**B. Plaintiff's Civil Rights Claims Still Fail to State Any Cause of Action.**

Plaintiff now asserts that he has sufficiently stated a cause of action to withstand dismissal under Federal Rule of Civil Procedure 12(b)(6) because, as he claims, his "due process" rights were violated. He admits, however, that he can supply this court with no federal case which decides the issue of whether due process requires the rights he claims at private hospital disciplinary proceedings. In so arguing, plaintiff admits that there is no case law or constitutional authority to support his assertion. For this reason alone, defendants' Motion should be granted.

**C. The Health Care Quality Improvement Act and its Provisions are Inapplicable.**

Nonetheless, plaintiff claims that the recently enacted Health Care Quality Improvement Act of 1986, 42 U.S.C.

§ 11111 absolutely entitles him to such procedural rights as right to counsel, right to an unbiased hearing panel, right to an unbiased hearing officer, right to call and cross-examine witnesses, right to adequate notice, etc. Plaintiff is in error.

Plaintiff's reliance upon the Health Care Quality Improvement Act for purposes of supporting his claims for civil rights violations is completely unwarranted and totally misplaced. This is because of two important facts, one of which plaintiff fails to mention at all. First, and critically, the immunity provided for a professional review actions set forth in § 11111(a) does not currently apply in the State of California.

This is because 42 U.S.C. § 11111(c) establishes in paragraph 1 that:

"except as provided in paragraph (2), subsection (a) of this section shall apply to state laws in a state *only for professional review actions commenced on or after October 14, 1989.*" (Emphasis added).

Moreover, the exceptions set forth in paragraph (2), permit states to "opt-in" for "actions commenced before October 14, 1989." Plaintiff presents this court no information that California has "opted in" or that, if it has, that the instant action that commenced in April, 1987 is subject to the Act. Accordingly, the Health Care Quality Improvement Act, and its provisions regarding "due process", are inapplicable to this case.

Secondly, and more importantly, plaintiff correctly cites in footnote 11 on page 15 of his opposition papers the fact that the limitation on damages provided by the Health Care Quality Improvement Act is inapplicable to damages in actions relating to "civil rights", including, *inter alia*, 42 U.S.C. 1981 *et seq.* See § 11111(a)(1). There-

fore, even if, *arguendo*, defendants had followed all of the procedural requirements set forth in the Health Care Quality Improvement Act to the letter, no immunity would exist for them under the Act given these exceptions. Accordingly, the provisions of the Health Care Quality Improvement Act are completely inapplicable to plaintiff's discussion regarding civil rights.

Nevertheless, should this court hold that the Act is somehow relevant to its determination of these issues, the Plaintiff's argumentation on this point fails to come to grips with the specific language of the Act or its legislative intent. Based on that language and that intent, his arguments should also be dismissed.

The Act provides, in pertinent part, that if a healthcare entity strictly complies with all of the standards outlined in 42 U.S.C. § 11112(a) it shall not be liable in damages under any law of the United States or of any state with respect to the action taken. The Act thus imposes immunity on certain conduct based upon compliance with specified procedural standards. Critically, however, Section 11112(a)(3) states that its requirements may be satisfied by the provision of *either* the notice and hearing procedures of Section 11112(b) *or* "such other procedures as are fair to the physician under the circumstances." Most importantly, Section 11112(b)(3)(D)(ii) states that "failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection 11112(a)(3)." Accordingly, it is reasonable to conclude that the standard set forth in the Health Care Quality Improvement Act regarding the "adequate" notice and hearing requirements of Section 11112(b) are not exhaustive, and that "such other procedures as are fair to the physician under the circumstances" may be employed by health facilities. In

that absence of any authority to the contrary, defendants contend that the Hospital Medical Staff Bylaws, adopted pursuant to State law, clearly qualify as "such other procedures."

The legislative history behind the "adequate" notice and hearing requirements of the Act clearly supports this view. In incorporating the alternative of procedures "fair" to the practitioner "under the circumstances", Congress was clearly aware that some states had already established fairness requirements for peer review activities by case law or statutory enactment, which requirements did not include the specific rights enumerated in that section. Congress, nevertheless, felt that "in those situations, compliance with applicable law should satisfy the 'adequacy' requirement even where such activities or actions require different or fewer due process rights than those specified [in Section 11112(b)]." See H.R. Rep. No. 903, Part 1, 99th Congress, 2nd Session 10-11, reprinted in 1987 U.S. Code Cong. & Ad. News 6393.

It is respectfully submitted that, in the State of California, where existing case law has exhaustively addressed these issues, and where the courts afford plaintiff judicial review pursuant to California Code of Civil Procedure Section 1094.5, plaintiff's "due process" claims can be properly adjudicated. See *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802 (1977); *Ascherman v. St. Francis Memorial Hospital*, 45 Cal.App.3d 507 (1975); *Westlake Community Hospital v. Superior Court*, 17 Cal.3d 465 (1976); and *Unterthiner v. Desert Hospital District*, 33 Cal.3d 285 (1983).

Based on the foregoing, plaintiff cannot demonstrate, and has not demonstrated, "state action" or the existence of federally protected constitutional rights for purposes of establishing this court's jurisdiction in this case. Ac-



cordingly, Defendants' Motion to Dismiss plaintiff's claims under Section 1983 and Section 1985(3) should be granted.

#### D. Abstention In This Case Is Warranted.

Plaintiff argues that the implementation of the Health Care Quality Improvement Act undercuts defendants' argument that this action "raises the important and sensitive issues of state health care policy" that should not be addressed in this forum. As noted above, the Health Care Quality Improvement Act supplements, not supplants, state policy and is inapplicable in several respects to plaintiff's civil rights claims. Thus defendants' position that state health care policy is clearly significant based on the facts of this case is still valid. All of plaintiff's citations to California state law and California state procedural remedies confirm this fact.

Since there is no dispute about the fact that there is a pervasive state policy regarding the importance of peer review activities in California, and since there is no dispute that there is extensive California state case-law on this subject, (see Defendants' Motion to Dismiss, Pages 9-12, and cases cited therein), plaintiff's First Amended Complaint should be dismissed.

#### IV.

#### PLAINTIFF'S CLAIM FOR DECLARATORY RELIEF STILL DOES NOT PRESENT A CASE OR CONTROVERSY AGAINST MOVING DEFENDANTS.

Plaintiff's attempt to boot-strap his way into federal jurisdiction by filing a claim for declaratory relief seeking an adjudication of the constitutionality of the Health Care Quality Improvement Act of 1986 as well as the

constitutionality of Section 805 and 805.5 of the Business and Professions Code is completely without merit. Plaintiff does not rebut the clear fact that declaratory relief "does not confer an independent basis of jurisdiction of the federal court." *Alton Box Board Company v. Espirit de Corps*, 682 F.2d 1267 (9th Cir. 1982). As noted previously, Section 805 and Section 805.5 of the Business and Professions Code require reporting and dissemination of information by and to all health facilities in the State of California. Moving defendants have no authority to do anything but obey the ministerial requirements of those statutes, and have no enforcement authority in connection with them. Accordingly, the complaint should be dismissed as to this claim for relief pursuant to moving defendants Motion.

Similarly, the Health Care Quality Improvement Act is completely inapplicable to this factual situation. Plaintiffs ingenious attempts to seek a constitutional determination regarding that Act the this court has absolutely nothing to do with the underlying facts in this case. Whether or not that Act is constitutional will not affect plaintiff's rights, all of which devolve from state law "fair procedure" requirements and not from a federal law which, to date, has not been "opted into" by the State of California. Accordingly, plaintiff's claim for relief on this ground should be denied.

#### V.

#### SANCTIONS UNDER RULE 11 ARE WARRANTED.

While sanctions should not be used to chill an attorney's enthusiasm or creativity for pursuing factual or legal theories, in this case, plaintiff has not rebutted in his opposition the point that his First Amended Complaint is without factual foundation and is legally unreasonable.

Although plaintiff's counsel has attempted creativity, he has done so in direct contradiction to existing case law, which was specifically cited to him in defendants' Opposition to his Ex-parte Application for a temporary restraining order. *Ezpeleta v. Sisters of Mercy Health Corporation*, 800 F.2d 119 (7th Cir. 1986). Moreover, plaintiff has not changed any allegations whatsoever with respect to the factual foundation for state action, and continues to assert that defendants are somehow legally "estopped" from arguing that their conduct is not state action. It is a little late in the game for this plaintiff to request leave of this court to once again amend his complaint on these issues, particularly after having sufficient prior notice of his "creativity" defects.

Finally, plaintiff did not respond in any way to the arguments set forth in Defendants' Opposition that plaintiff's counsel has interposed the First Amended Complaint for improper purposes. Those arguments, set forth at pages 28-30 of the Defendants' Motion to Dismiss stand un rebutted. For those reasons alone, sanctions against plaintiff's counsel should be granted pursuant to Rule 11.

## VI.

## CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court dismiss plaintiff's First Amended Complaint in its entirety, and award sanctions to the Defendants.

Dated: September 14, 1987

WEISSBURG AND ARONSON, INC.  
ROBERT J. GERST  
J. MARK WAXMAN

By: \_\_\_\_\_ (Signature)  
J. MARK WAXMAN  
*Attorneys for Defendants*

(PROOF OF SERVICE OMITTED IN PRINTING)



UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

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**EX PARTE APPLICATION TO RECONSIDER  
DEFENDANTS' MOTION TO DISMISS, OR IN THE  
ALTERNATIVE, TO VACATE ORDER DISMISSING CASE;  
REQUEST FOR JUDICIAL NOTICE; PROPOSED ORDER**

---

COMES NOW Simon J. Pinhas, M.D., plaintiff, through his counsel of record, Lawrence Silver A Law Corporation and Blecher & Collins, and hereby seeks this Court's reconsideration of its decision announced on September 21, 1987 to dismiss the action herein, or in the alternative, to vacate its order, if entered, dismissing the action, and to take judicial notice of the granting of a Petition for a Writ of Certiorari by the Supreme Court of the United States in *Patrick v. Burgett*, 800 F.2d 1498 (9th Cir. 1986).

1. Defendants', in their Motion to Dismiss, placed principal reliance on the application of the "state action doctrine" immunity applied by the Ninth Circuit in *Patrick v. Burgett*, 800 F.2d 1498 (9th Cir. 1986), to peer review proceedings.

2. This Court in its decision rendered on September 21, 1987, (Transcript of Proceedings, pages 9-10), relied upon the application of the state action doctrine immunity to peer review proceedings citing *Marresse v. InterQual, Inc.*, 748 F.2d 373 (7th Cir. 1984), *cert. denied* 472 U.S. 1027, 105 S.Ct. 3501 (1985) as adopted by the Ninth Circuit in *Patrick v. Burgett*, *supra*, in its determination to dismiss the Complaint.

3. On October 5, 1987, the Supreme Court of the United States granted the Petition for a Writ of Certiorari in *Patrick v. Burgett*, *supra*.

4. It is appropriate, in light of the Supreme Court's issuance of a Writ of Certiorari, that this Court:

a. Take judicial notice of the issuance by the Supreme Court of a Writ of Certiorari in *Patrick v. Burgett*, *supra*;

b. Reconsider its determination to dismiss the action and require the hearing on the reconsideration to follow the Supreme Court's determination of *Patrick v. Burgett*; and/or

c. Vacate its order of dismissal, if entered.

DATED: October 6, 1987

LAWRENCE SILVER  
A Law Corporation

By \_\_\_\_\_ (Signature)  
Lawrence Silver,  
*Attorneys for Respondent*  
*Simon J. Pinhas, M.D.*

(PROPOSED ORDER OMITTED IN PRINTING)  
(PROOF OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

**OPPOSITION TO EX PARTE APPLICATION FOR  
RECONSIDERATION**

Plaintiff's Ex Parte Application for Reconsideration  
should be denied for the following reasons:



(1) No authority is cited for the proposition that this Court's decision was incorrectly made;

(2) No authority is cited for the proposition that the mere granting of a petition for *certiorari* is a basis to reconsider the decision in this case;

(3) It fails to meet the requirements for a motion for reconsideration under Local Rule 7.16;

(4) It fails to meet the requirement of motion for new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure; and

(5) It fails to meet the requirements necessary to obtain relief from a judgment or order pursuant to Rule 60 of the Federal Rules of Civil Procedure. Accordingly, the proposed order dismissing this action submitted by defendants should be entered.

Initially, Rule 7.16 of the Local Rules of the Central District state that a motion for reconsideration can be made only on grounds of a material difference in the relevant facts or the emergence of a change in law occurring after the time of the decision. The fact that cert was granted in this case would not change the decision of this Court for the following reasons. First, the Court itself determined as a matter of public policy that the anti-trust claims in this action should fail. This is made clear in reviewing the transcript of the hearing (a copy of which is attached as Exhibit A) wherein the Court did not place sole reliance on *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986), but relied on the overall policies embodied in California State Law decisions, the decision of the Seventh Circuit in *Marrese v. Intergard, Inc.*, 748 F.2d 373 (7th cir. 1984) and the desire to insure that medical staff processes were not threatened with anti-trust liability. In particular, the Court noted that recent legislation was

designed to provide additional safe harbor protection rather than reduce anti-trust immunities. (See e.g., transcript of hearing at page 11). Accordingly the fact that the Supreme Court has determined to hear *Patrick v. Burget* does not constitute emergence of a change of law occurring after the time of the Court's decision.

Similarly, the requirements under Rule 59 of the Federal Rules of Civil Procedure have also not been met. Rule 59 provides that a motion for new trial may be granted and the Court may "open the judgment" solely to take additional testimony or amend its findings of fact and conclusions of law. There is no basis at this time to make such a determination and accordingly the judgment should be entered.

Rule 60 providing for relief from a judgment or order also does not provide that relief requested may be granted on an *ex parte* basis based upon the fact that a petition for *certiorari* has been granted in an independent, although legally related, action.

Finally, and independent of the rule cited, there is no authority cited by plaintiff herein for the proposition that: (a) plaintiff's motion should be considered on an *ex parte* basis; or (b) the granting of *certiorari* by the Supreme Court in an independent action is the basis for a motion for reconsideration after a Court determination has been made to enter judgment.

As a result of both the procedural and substantive insufficiency of the application, it should be denied.

Dated: \_\_\_\_\_

WEISSBURG AND ARONSON, INC.

By \_\_\_\_\_ (Signature)  
J. MARK WAXMAN  
*Attorneys for Defendants*

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE FERDINAND F. FERNANDEZ,  
JUDGE PRESIDING

[CAPTION OMITTED IN PRINTING.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
LOS ANGELES, CALIFORNIA  
MONDAY, SEPTEMBER 21, 1987

SUSAN A. LEE, CSR 2800, CM, RPR  
Official Court Reporter  
435 United States Courthouse  
312 North Spring Street  
Los Angeles, California 90012  
(213) 626-6353

APPEARANCES:

FOR THE PLAINTIFF:

LAWRENCE SILVER, ESQ.  
9100 Wilshire Boulevard, Ste. 90212  
Beverly Hills, California 90212  
(213) 274-1580

Exhibit "A"



BLECHER AND COLLINS  
 By: ALICIA G. ROSENBERG, ESQ.  
 611 West Sixth Street, Ste. 2800  
 Los Angeles, California 90017  
 (213) 622-4222

FOR THE DEFENDANTS:

WEISSBURG AND ARONSON, INC.  
 By: J. MARK WAXMAN, ESQ.  
 2049 Century Park East, 32nd Flr.  
 Los Angeles, California 90067  
 (213) 277-2223

TRANSCRIPT OF PROCEEDINGS OF MONDAY,  
 SEPTEMBER 21, 1987  
 HEARING: DEFENDANTS' MOTION TO DISMISS

LOS ANGELES — CALIFORNIA,  
 MONDAY, SEPTEMBER 1, 1987  
 — 10:00 A.M. SESSION

The Court: No. 8, Pinhas.

Mr. Silver: Lawrence Silver, Your Honor, for the Plaintiff Simon Pinhas.

Mr. Waxman: Mark Waxman for the defendants.

Mr. Silver: Your honor, there's also an additional appearance.

The Court: Oh, go ahead.

Ms. Rosenberg: Alicia Rosenberg for the plaintiff, also, Mr. Pinhas.

The Court: Thank you. You folks have seen the court's notes. If you'd like to be heard, I'll give you up to five minutes each. Of course, the moving party may go first.

Mr. Waxman: I think we'll submit on the tentative.

The Court: All right.

Mr. Silver: Your honor, in light of the court's tentative, I believe I do have a laboring oar.

The Court: I think you're right.

Mr. Silver: If I may first address the antitrust issue, and that is, unless I'm wrong, I think it's framed in the tentative whether or not *Patrick versus Burget* survives the enactment of the Health Care Quality Improvement Act. It is our position that *Patrick versus Burget* does not survive the Health Care Quality Improvement Act and that there is a specific congressional policy reason why the court should be moved to change the tentative afternoon ruling in that fashion.

That is, if you examine, as I'm sure Your Honor has, all the congressional concerns about, on the one hand, fairness to counsel and fairness to the physician who is under review, as compared to providing for a national repository of information regarding physicians who perform in a fashion less than satisfactory, congress and the great thrust of the matter, in addition to providing the antitrust immunity, was to provide for this repository.

Now, if the court holds, that is the judicial system holds, that in states such as Illinois, Indiana, New York, Pennsylvania, California, and Washington, as a beginning, because that's where we have decided cases, that there is no — that all of these types of proceedings are state actions, then defendants, or in this case, and defendants in other similar cases, can say, "we need not

comply at all with the Health Care Quality Improvement Act. We need not give due process. We need not give information to the National Repository. We need not buy in, because we already have an absolute, complete immunity under the state action doctrine."

Consequently, it seems that — it seems, Your Honor, that if the purpose of Congress was to let such defendants buy into antitrust immunity, in order to buy in, they had to do certain things. They had to, one, conduct hearings fairly, which they have not done here. They, two, had to provide a certain defense in those hearings, certain defense obligations, which has not been done here. And lastly, in order to buy in, they had to make reports to the National Clearing House.

If the state action doctrine protects them fully, without involvement with HCQIA, then there is no reason for them to buy in. They can continue to give hearings that lack due process. They can continue to not provide information to the National Repository. And therefore, by saying that the state action doctrine, as articulated in *Patrick v. Burget*, survives HCQIA is to interfere with congressional intent.

In addition, Your Honor, as I hand-delivered to Your Honor, as well as opposing counsel, a case on Friday, *Tambone v. Memorial Hospital*, the 7th Circuit Case, and the only case that mentions HCQIA, in that case the court found, at least on the basis of that record, that there were not sufficient facts to determine whether or not the state action doctrine applies.

Since *Marrese* is the seminal case out of the 7th Circuit, in which it says the state action doctrine applies, of course *Patrick* relies heavily on *Marrese*, that the 7th Circuit now says that you have some factual showing as to

whether or not the hand of the state is sufficiently involved in connection with the matter.

Your Honor's tentative ruling would mean that in light of the allegations of the complaint, but on the allegations of the complaint, Your Honor, it would determine that there is an absolute immunity as a matter of law without any factual showing by the defendants.

Consequently, I think for two reasons Your Honor should, one, determine that *Partick versus Burget* does not survive HCQIA, and, two — as well as the statutory language; and, two, because there needs to be a factual showing.

If I now might address myself to the Civil Rights Acts, Your Honor.

The Court: You ever a minute left.

Mr. Silver: That is a shame, Your Honor because I think that it is very important in terms of —

The Court: You have a minute left, in any event.

Mr. Silver: I'm sorry?

The Court: You have a minute left.

Mr. Silver: Thank you, Your Honor.

If we go to the old notions of what the Civil Rights Act was supposed to do, you take a look at the Ku Klux Klan going to the house of a minority and saying, "I'm a sheriff. Come with me," that a state actor under the old Civil Rights Act and the current Civil Rights Act is a person who claims authority under color or state law. That is also the rule, and consequently Your Honor's determination that these are not state actors within the meaning of the Civil Rights Act, I think would — there is a totally private action, quote, "under color of state law."



In the case that both parties rely upon, *Lugar versus Edmondson Oil*, there a person asked the sheriff to do something. A private person asked the sheriff to do something. And that private person was held to be in violation as a state actor in violation of the Civil Rights Act.

Further, as we have cited, both in *Wisconsin versus Constantineau*, as well as *John Marshall versus Sawyer*, there were private parties involved in the state action process, and that would be sufficient conduct under the threat or color of state law to bring them within the state action doctrine.

The Court: Thank you Mr. Silver.

Mr. Silver: Thank you, Your Honor.

The Court: Counsel wish to respond?

Mr. Waxman: Just briefly, Your Honor. First, the health act cited obviously doesn't apply because of the date involved and the exemption which they failed to point out, both of those points. The medical staff case, *Patrick*, still is the law of the 9th Circuit. And of most interest is they never cite *Ezpeleta*, the leading case that the court cited itself the first time around.

So nothing really has changed this time from last time, and I think the Court's tentative should stand.

The Court: All right. Well, first of all, as to the antitrust claim, it seems to this Court that immunity does exist of necessity, and of necessity it must. It's clear to the Court that, at least in California, hospitals are among the most regulated institutions. That's made clear by the pleading in this case, even if the Court didn't bother picking up the California Administrative Code and the California Codes themselves.

That's because the Courts in this state, and properly so, and the legislature of this state, desire to have a very high quality medical care for the citizens of California. The regulatory scheme includes, of course, the Boards of Medical Examiners, boards to examine the nurses, the B.M.Q.A., peer review committees, and a good deal of additional supervision.

The policies are furthered, also, through common law principles which hold hospitals liable for the torts of their medical staff under many circumstances. In addition, of course, California has enacted a number of immunity statutes to protect the people who participate in the peer review process — and among those, of course, are California Civil Code 43.7 and 43.8, 47-2 — and has also enacted reporting laws so that the boards can accumulate information and thereby attempt to protect the public.

In *Marrese versus Intergard, Inc.*, at 748 Fed. 2d 373, the 7th Circuit case referred to here, 1984 case, the Court did consider the application of the state action doctrine in a private hospital setting under laws quite similar to California's, and it concluded that the antitrust laws did not apply.

That court also recognized the dilemma that's imposed upon hospitals and their governing boards and their staffs by the expectations of our society. Those individuals are placed between the scylla of suits by injured patients and the charybois of suits by disgruntled doctors who are denied or terminated from privileges.

The states have tried give some protection against this. And seems to the court it would be most inappropriate for the court to now determine that these actors are to be threatened with antitrust liability when they're working within a review process.

By the way, that very process does provide, at least under California state law, for ultimate review by the courts of the state so that a proper control can be kept over the damage that could be caused by inappropriate actions. And as counsel know, that appears in C.C.P. 1094.5. The 9th Circuit appears to be in agreement with that approach, as shown by *Patrick v. Burget*, at 800 F.2d 1498, 9th Cir., 1986.

Nor does the court think that the recent legislation by Congress, assuming it applies to this case, was intended to cut back on the antitrust immunity and therefore to make it easier to sue peer review participants in hospitals in states like Oregon and California which already have comprehensive laws regulating this area.

The genesis and the history of that legislation suggests to this court an intent to provide additional safe harbor protection for those persons and entities and not less protection. The recent case the Court's been cited to, the Court will note, did indicate that in the state there considered, the 7th Circuit was not dealing with laws like those that are enforced as they are in California, as opposed to what it was dealing with in *Marrese*.

The long and the short of it is that public policy makes it quite clear that people who participate in the assurance of medical quality should be protected from having to face antitrust lawsuits such as this one. And most courts and most legislative bodies who have addressed the issues have found that, for one reason or another.

It seems quite appropriate in this case if the state action doctrine continues as it has in the past and the congressional legislation be read as conferring the additional protection, and indeed to take the case like the Illinois case, it may indeed confer protection in states

which have no other process for protection of their own, as opposed to those such as Oregon and California.

As to the civil rights action, here again, the Court sees no cause of action spelled out. Simply put, no civil rights conspiracy can be shown, as there's no action of the state that is implicated in the deeds of these defendants.

The Court recognizes the possibility of a claim that if there is or is not state action for the purposes of antitrust doctrine, then the same must hold for the civil rights claim. But that, of course, would buy into the logical fallacy of assuming that the use of some word or phrase in two different contexts conveys the same meaning in both of those contexts. It does not. And *Ezpeleta v. Sisters of Mercy Health Corporation*, at 800 F.2d 119, 7th Circuit, 1986, demonstrates it does not.

There's nothing to suggest the state has participated in any way in the peer review process of the plaintiff. And it seems to the Court that it almost borders on the frivolous to state that the mere fact that the results of that process are to be reported converts the actions of the defendant into state actions for these purposes. Moreover, it seems to the Court rather inappropriate to rely on 43 U.S. Code 1085 where there's no racial or simply class-based animus pled or shown.

As to declaratory relief, the Court believes the defendants are correct in their contention that they are decidedly the wrong people to be contesting whether the California or federal reporting statutes are constitutional. First of all, it can be said that the controversy is hardly ripe, since as the Court understands it, the hospital proceeding is not yet final and certainly hasn't made its way to the court.



Secondly and more importantly, the plaintiff seeks to require the defendants to defend a state policy, and now a federal policy, that requires them to report their actions, or allows them to. It should be strange indeed to find that the defendants care one way or the other about whether those policies stand or fall, at least in the sense that they must make reports.

It certainly is counterintuitive to find that those who are forced to file reports to the government are the ones to defend the government's demand for the reports. It seems to me that if the plaintiff wants a review of California's policy of reporting in this regard, then these are not the parties to seek it from. Nor does it seem to the court that it's just or proper to impose the cost of defending federal and state policies of this nature upon these particular parties, a number of doctors in a private hospital.

Beyond that, the court thinks that it would be quite inappropriate to proceed with declaratory relief in this sort of situation, were it to find it otherwise should do so, because it would be simply unfair and unjust to these parties. It would be inequitable. And the court feels that if it had to do so, it would simply exercise its discretion to refuse to go forward with declaratory relief against these individuals.

For all of those reasons, the motions to strike for failure to state a cause of action should be and hereby are granted. However, considering the nature of the issues involved here, the court is certainly not going to impose Rule 11 sanctions at this time. The court will agree that in some ways one is surely tempted to impose such sanctions, particularly when a plaintiff seems to simply be striking out at everybody in sight, including even the

defendants' lawyers, in an attempt to drag everyone he can think of into a lawsuit.

Nevertheless, in the posture of this particular case at this time, the court is not able to find that Rule 11 sanctions should be imposed, since it is not convinced that the Rule 11 strictures have been violated.

That'll be the ruling of the court. The motion, as I say, is granted, without leave to amend. The court sees no purpose in granting leave to amend at this time. I don't see how the parties could possibly cure what I see as the basis for the civil process and legal defense. I think they stated what they had to state as well they can.

Would counsel please prepare an appropriate formal order.

Mr. Waxman: I will, Your Honor.

In view of the fact court has obviously spent a great deal of time analyzing the issues here, I wonder if the court would give some consideration to publishing this opinion. As the court knows, this comes up all the time between hospitals on statutes and medical staffs, and such an opinion would be of great assistance in clarifying the law in the area, in that it is somewhat a new area.

The Court: Well, I'll give it some consideration. But from looking over here at plaintiff's counsel, I have a sneaking suspicion that they're going to be asking for clarity from a more august body than this court, and you will probably have a published opinion of even greater import and value before long. But I will consider it.

Mr. Waxman: Thank you.

Mr. Silver: Your Honor, there's one, I believe, house-keeping matter that we should advise the court of, and that is plaintiffs did bring into this action the State of

California and there is a stipulation floating, that has left my office and may have reached Mr. Waxman's office, on it's way down to the State of California to dismiss the State as a party defendant to this action.

I believe that with leave, by the way, and plaintiff absolutely, to bring them back in, in the event that the defendants asserted they were necessary party, in order to short-circuit any other problems and paths to the circuit, I would nonetheless ask Your Honor to sign that order dismissing the State of California, as well as the order dismissing the action, so that if we do seek circuit review there is no short-circuiting it by this stipulation. I'd want a final order, in other words.

The Court: Sure. And I would think that if the State of California's dismissed and I granted these Motions to Dismiss without leave to amend, we've got nothing left. You've got a final order. Am I not correct?

Mr. Silver: Well, that'll have to await the signing of the stipulation as well as Your Honor's signing of this order.

The Court: Correct.

Mr. Silver: Thank you, Your Honor.

The Court: Okay.

(Proceedings Adjourned.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: September 27, 1987

\_\_\_\_\_  
(Signature)

Susan A. Lee, CSR 2800, CM, RPR  
*Official Court Reporter*

(PROOF OF SERVICE OMITTED IN PRINTING)

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 87 03292 FFF (GHKx)

SIMON J. PINHAS, M.D.,  
*Plaintiff,*

v.

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER; ARTHUR N. LURVEY; RICHARD E. POSELL; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; WEISSBURG AND ARONSON, INC.; AND STATE OF CALIFORNIA BOARD OF MEDICAL QUALITY ASSURANCE,  
*Defendants.*

WEISSBURG AND ARONSON, INC.

ATTORNEYS AT LAW

32nd Floor, Two Century Plaza

2049 Century Park East

Los Angeles, California 90067

J. MARK WAXMAN

*Attorneys for Defendants*

**ORDER DISMISSING ACTION**

On September 21, 1987 the Motions of defendants Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathan I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski and



Weissburg and Aronson, Inc. to dismiss plaintiff's Complaint and this action made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), together with defendants' Motions for Sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure came on for hearing before Ferdinand F. Fernandez, United States District Judge, Judge Presiding. The moving parties were represented by J. Mark Waxman, Esq. of Weissburg and Aronson, Inc. Plaintiff was represented by Lawrence Silver, Esq. and Alicia G. Rosenberg, Esq.

The Court, having considered all of the pleading, files, memoranda and documents on file herein, determined to grant the Motion for Dismissal filed by moving parties, and to deny the Motion for Sanctions pursuant to Rule 11.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint against Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathan I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski and Weissburg

and Aronson, Inc. shall be and is hereby dismissed without leave to amend.

Dated: October 2, 1987

(signature)

FERDINAND F. FERNANDEZ

United States District Judge

Presented by:

(signature)

J. MARK WAXMAN, ESQ.

Weissburg and Aronson, Inc.

Attorneys for Summit Health, Ltd.

et al.

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[CAPTION OMITTED IN PRINTING.]

**NOTICE OF APPEAL AND DEPOSIT  
OF APPEAL FEE**

NOTICE IS HEREBY GIVEN that plaintiff Simon Pinhas, M.D. hereby appeals to the United States Court of Appeal for the Ninth Circuit from the Order entered on October 9, 1987, granting defendants' Motion to Dismiss.

The parties affected by this Order and their attorneys are: defendants Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathn I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski, and Weissburg & Aronson, Inc., by their counsel, Weissburg & Aronson, by J. Mark Waxman, 2049 Century Park East, 32nd Floor, Los Angeles, California 90067 and Simon J. Pinhas, M.D., by his counsel, Lawrence Silver A Law Corporation, by Lawrence Silver, 9100 Wilshire Boulevard, Suite 360 West, Beverly Hills, California 90212 and Blecher & Collins, by Maxwell M. Blecher, 611 West Sixth Street, Suite 2800, Los Angeles, California 90017.

Plaintiff transmits herewith the appeal fee in the sum of \$105.00.

DATED: October 21, 1987

LAWRENCE SILVER  
A Law Corporation

By: \_\_\_\_\_ (Signature)  
Lawrence Silver,  
*Attorneys for Respondent*  
*Simon J. Pinhas, M.D.*

(PROOF OF SERVICE OMITTED IN PRINTING)



(3)  
No. 89-1679

Supreme Court, U.S.  
FILED

AUG 10 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

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SUMMIT HEALTH, LTD., ET AL.,  
*Petitioners,*  
vs.

SIMON J. PINHAS, M.D.,  
*Respondent.*

---

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

---

BRIEF FOR THE PETITIONERS

---

J. MARK WAXMAN\*  
TAMI S. SMASON  
WEISSBURG AND ARONSON, INC.  
Attorneys at Law  
2049 Century Park East  
Suite 3200  
Los Angeles, California 90067  
(213) 277-2223  
*Counsel for Petitioners*  
\* Counsel of Record

**QUESTION PRESENTED**

Whether a claim under Section 1 of the Sherman Act which fails to allege any nexus between the allegedly anticompetitive activity and interstate commerce nevertheless meets the jurisdictional requirements of the Sherman Act, as interpreted by this Court in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980)?



## THE PARTIES

The parties before the court of appeals included Simon J. Pinhas, M.D., Summit Health, Ltd. Midway Hospital Medical Center, the Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Richard E. Posell, Jonathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc.<sup>1</sup> Richard E. Posell and Peggy Farber were not parties to the antitrust claim, which is the only claim in the underlying action reinstated by the court of appeals, and the only claim upon which this petition is based. They therefore have no interest in the outcome of this review and are not petitioners herein.

<sup>1</sup> The rule 28.1 list is contained in footnote 1 of the Petition for a Writ of Certiorari.

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## **OPINION BELOW**

The opinion of the court of appeals (printed in Appendix to the Petition for a Writ of Certiorari ("App. Pet."), at A-1) is reported at 894 F.2d 1024 (9th Cir. 1989).

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## **JURISDICTION**

The opinion of the court of appeals issued on July 26, 1989, and was amended and superseded on January 25, 1990. Petitions for rehearing were filed by all parties and were denied on January 25, 1990. (App. Pet. at A-1.) The Petition for a Writ of Certiorari was filed on April 24, 1990, and certiorari was granted on June 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## **STATUTES INVOLVED**

Sherman Act § 1, 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

---

## **STATEMENT OF THE CASE**

The First Amended Complaint, which frames the issues to be litigated in this action, asserts that a peer review action taken against a surgeon's medical staff privileges at Midway Hospital Medical Center, an acute



care hospital located in Los Angeles, California, was based on false charges of deficient quality of care, which were the product of an antitrust conspiracy.<sup>2</sup> It is alleged that the antitrust conspiracy by the hospital, its parent corporation, members of its medical staff, and its attorneys was motivated by a desire to retaliate against Dr. Pinhas for refusing to accept an allegedly "sham" contract to perform administrative and educational services at Midway. The First Amended Complaint does not contain any allegations that the challenged conduct occurred in or had any impact on interstate commerce. Instead, the sole interstate commerce allegations are that the plaintiff and each of the defendants are "engaged in interstate commerce." J.A. 2-6.

On October 9, 1987, the district court entered its order granting defendants' motion to dismiss the First Amended Complaint without leave to amend. J.A. 315. The Ninth Circuit reversed the order of the district court dismissing the antitrust claim. With respect to the Sherman Act jurisdictional issue, the circuit court held that the general allegations that the parties are "engaged in interstate commerce" were sufficient to invoke jurisdiction under Section 1 of the Sherman Act, even though Dr. Pinhas did not allege that the challenged conduct was in

<sup>2</sup> The discipline imposed by the peer review action was determined to have been based on substantial evidence by the Superior Court of the State of California ruling upon Dr. Pinhas' Petition for a Writ of Mandate. Defendants hereby request that the Court take judicial notice, pursuant to FED. R. EVID. 201, of the superior court ruling, printed in App. Pet. at A-32. An appeal is now pending from the superior court ruling.

or affected interstate commerce, relying upon this Court's decision in *McLain v. Real Estate Board of New Orleans*. The Ninth Circuit further held that the relevant test for establishing Sherman Act jurisdiction was whether the peer review process "in general" had any effect on interstate commerce, but did not require any allegation that it did. Instead, it stated, without any factual allegations as its basis, that it "can hardly be disputed" that the test would be met in this case because "[peer review] proceedings affect the entire staff at Midway and thus affect the Hospital's interstate commerce." App.Pet. A-19-20.

This Court granted the Petition for Certiorari to determine whether the allegations of the First Amended Complaint satisfy the jurisdictional requirements of the Sherman Act.

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### SUMMARY OF ARGUMENT

In determining whether there is an effect on interstate commerce sufficient to satisfy Sherman Act jurisdiction, this Court has consistently focused on the facts alleged in a complaint asserting a nexus between the challenged activity and interstate commerce, and not on the defendant's general business activities. That focus has required federal district courts to review Sherman Act jurisdiction issues on a case-by-case basis, seeking a practical application of the Sherman Act to the economic realities of the day. Accordingly, Sherman Act plaintiffs have been required to plead, and if controverted, to prove that the challenged conduct had a substantial effect on interstate commerce as a matter of practical economics.

To allow a plaintiff to state a claim under the Sherman Act on the bare allegation that the defendants have

been engaged in interstate commerce would effectively eliminate the jurisdictional requirements of the Sherman Act, since the general business activities of most professional and commercial concerns have some effect on interstate commerce. See *United States v. Yellow Cab Co.*, 332 U.S. 218, 231 (1947) (Sherman Act jurisdiction does not extend to activities which have only a "casual and incidental" relationship to interstate commerce).

Such an interpretation would also be inconsistent with this Court's historic interpretation of the Sherman Act, would unnecessarily add to the rising tide of litigation in the federal courts and would yield results contrary to the public policy of encouraging effective medical staff peer review. Participation in peer review, no matter how slight, would expose each of the participants to the threat of Sherman Act litigation, with its attendant threat of treble damages and attorneys' fees, even where the nexus with interstate commerce is remote, incidental, or nonexistent. Accordingly, the Ninth Circuit's Sherman Act jurisdiction holding should be reversed.

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## ARGUMENT

### I. INVOCATION OF SHERMAN ACT JURISDICTION REQUIRES A CASE-BY-CASE ANALYSIS OF THE FACTUAL NEXUS BETWEEN THE ALLEGED RESTRAINT AND INTERSTATE COMMERCE

An analysis of whether jurisdiction exists under the Sherman Act is to be based upon an intensely practical, case-by-case review of the facts presented to determine

the actual factual relationship between the alleged restraint and interstate commerce. See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-784 (1975) (examining the specific transactions in question and their connection to interstate commerce "in a practical sense"). A consistent line of cases examining Sherman Act jurisdictional requirements, focused on the specific facts presented in each case, has thus developed, beginning shortly after the Sherman Act's enactment, and continuing through to the present day.

The early cases exploring the jurisdictional scope of the Sherman Act focused on whether the challenged conduct was "in" interstate commerce. See, e.g., *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 227 (1899); *Montague & Co. v. Lowry*, 193 U.S. 38, 48 (1904); *United States v. Patten*, 226 U.S. 525, 542 (1913). This test was later supplemented by an alternative test by which a plaintiff could establish Sherman Act jurisdiction by alleging a restraint which directly affected interstate commerce. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 544 (1935). Under either test, this Court's holdings on the subject of Sherman Act jurisdiction, from the inception of the Act, have been dependent upon finding a relationship between the alleged restraint and interstate commerce, and not on a generalized consideration of the business activities in which the defendants may engage. See *Addyston*, 175 U.S. at 235 ("[w]e are thus brought to the question whether the contract or combination proved in this case is one which is either a direct restraint or regulation of commerce among the several states . . ."); *Montague*, 193 U.S. at 48 (Sherman Act jurisdiction existed because "[t]he agreement directly



affected and restrained interstate commerce"); *Patten*, 226 U.S. at 543 (Sherman Act jurisdiction existed because "the conspiracy was to reach and bring within its dominating influence the entire cotton trade of the country"); *A.L.A. Schechter Poultry*, 295 U.S. at 544 ("[d]id the defendants' [challenged] transactions directly 'affect' interstate commerce so as to be subject to federal regulation?").

The factually oriented consideration of the alleged restraint and its particular relationship to interstate commerce established in these early cases has been reaffirmed consistently. Illustrative of the type of analysis required was that performed in *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Construing allegations in the complaint, this Court considered whether a price-fixing arrangement among sugar refiners had a sufficient effect on interstate commerce to permit the invocation of Sherman Act jurisdiction. In reaching its conclusion, this Court conducted a detailed factual analysis of the effects of the alleged price-fixing of sugar beet purchases on the subsequent sale of sugar in interstate commerce, and concluded that "in the circumstances of this case" (*id.* at 242), the restraint could be shown to have a sufficient effect on interstate commerce to invoke Sherman Act jurisdiction. Had this Court limited its jurisdictional requirement to allegations relating only to the interstate activities of the defendants, such an analysis would have been unnecessary; there was never an issue whether the refiners sold their product in interstate commerce. *Id.* at 221. It was the interstate commerce effect of the restraint itself, as asserted in the factual allegations of the complaint, which decided the jurisdictional issue. See also *United States v. Women's Sportswear Ass'n.*, 336 U.S.

460, 464 (1949) (requiring that "[t]he business affected by the restraint is interstate commerce").

Nineteen years later, in *Burke v. Ford*, 389 U.S. 320 (1967), allegations by liquor retailers in Oklahoma that Oklahoma liquor wholesalers illegally divided the state into exclusive territories were also before this Court for a jurisdictional determination. The trial court dismissed the complaint for lack of proof of an effect on interstate commerce. This Court reversed, holding that the appropriate jurisdictional test was "well established" as whether the challenged activity is in or substantially affects interstate commerce. *Id.* at 321. Again, applying this test, the Court engaged in an economic analysis of the challenged activity and its relationship to interstate commerce as the key to finding Sherman Act jurisdiction.

In 1975 this Court again was confronted with the issue of whether a conspiracy had a sufficient nexus with interstate commerce to fall within the ambit of the Sherman Act. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the plaintiffs attempted to hire an attorney to conduct a title examination in connection with their prospective home purchase. They were unable to find an attorney in the county who would conduct the examination for less than a minimum fee "suggested" by the county bar association, and sued for violation of Section 1 of the Sherman Act. To determine whether there was a sufficient effect on interstate commerce, this Court examined "the transactions which created the need for the particular legal services in question" *id.* at 783-84, and their impact on interstate commerce:

[g]iven the substantial volume of commerce involved, [footnote omitted] and the inseparability of this particular legal service from the

interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected. See *Montague & Co. v. Lowry*, 193 U.S. 38, 45-46, 24 S. Ct. 307, 309, 48 L. Ed. 609 (1904); *United States v. Women's Sportswear Assn.*, 336 U.S. 460, 464-465, 69 S. Ct. 714, 716, 93 L. Ed. 805 (1949).

*Id.* at 785. This Court therefore once again focused on the particular restraint alleged and the affected interstate commerce activity to determine whether the facts in that case created potential Sherman Act liability.

The following year, in *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976), this Court held that a complaint which alleged a conspiracy to prevent the expansion of a hospital and to monopolize hospital services in Raleigh, North Carolina, adequately alleged a substantial effect on interstate commerce flowing from the alleged restraint to state a claim under the Sherman Act. The corporate operator of a 49-bed hospital alleged that a competing hospital and others conspired to prevent it from relocating and expanding to 140 beds, and conspired to monopolize the business of providing hospital services in Raleigh. Examining the effect on interstate commerce which would result from "respondents' anti-competitive conduct" (*id.* at 741), this Court determined that a successful conspiracy would reduce the management fees paid to an out-of-state parent corporation and would eliminate the proposed multimillion dollar out-of-state financing for the expansion. These factors, combined with allegations that a successful conspiracy would adversely affect purchases of medicine and supplies from out of state and revenues from out-of-state insurance companies, satisfied the "effect on interstate commerce"

test. *Id.* at 744. Relying on its opinion in *Burke v. Ford*, this Court held that the relevant test was whether interstate commerce was affected by the alleged restraint "as a matter of practical economics." *Hospital Building Co.*, 425 U.S. at 745. Thus, the focus was on the practical economic effects of the conspiracy, not on the defendants' general business activities.

This Court's next and most recent examination of the jurisdictional requirements of the Sherman Act was in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), involving allegations that real estate brokers conspired to fix prices for the purchase and sale of residential real estate. *Id.* at 235. The complaint asserted that the defendants carried out the alleged conspiracy by fixing commissions for brokerage services at an artificially high level, "with the effect that the prices of residential properties have been artificially raised." *Id.* The brokerage services, for which it was alleged that fees were fixed, included obtaining financing and insurance from outside the state. *Id.*

Relying on the series of decisions discussed *supra*, this Court held that whether Sherman Act jurisdiction applied depended on whether the activities "infected" by a price-fixing conspiracy had a substantial effect on interstate commerce "as a matter of practical economics." *Id.* at 246 (citing with approval *Hospital Building Co.*, *Goldfarb* and *Burke*). To reach its conclusion on that issue, this Court again critically examined the alleged restraint and its potential effects on interstate commerce, and concluded that the plaintiffs sufficiently identified a relevant aspect of interstate commerce which was substantially affected by the challenged activity. In so holding, this



Court noted that the plaintiff is required to identify "the relevant aspect of interstate commerce . . . ; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings. . . ." *Id.* at 242.

Accordingly, in *McLain* this Court continued the thrust of almost a century of decisions concerning anti-trust jurisdiction requiring an allegation that the challenged activity either directly affected interstate commerce, or "infected" some otherwise local activity which has a substantial effect on an identified aspect of interstate commerce.

## II. THE NINTH CIRCUIT'S INTERPRETATION OF *McLAIN V. REAL ESTATE BOARD OF NEW ORLEANS* IS INCONSISTENT WITH THIS COURT'S HOLDING AND THE PRECEDENTS UPON WHICH THAT HOLDING IS BASED.

To find Sherman Act jurisdiction, the Ninth Circuit read this Court's holding in *McLain* to require only that "as a matter of practical economics" the activities of defendants (referencing the peer review process in general) have a not insubstantial effect on interstate commerce. No factual relationship between the restraint alleged and interstate commerce was found to be required. Nor did the circuit court engage in any economic analysis of the practical economic effects on interstate commerce of the purported restraint. Instead, the court reached the unalleged and unfounded conclusion that peer review proceedings, in and of themselves,

"affect the entire staff" and "thus" affect interstate commerce. App. Pet. A-20. This holding was apparently based on the comment in *McLain* that a "particularized showing of an effect on interstate commerce caused by the alleged conspiracy . . ." is not required to establish the jurisdictional element of a Sherman Act violation. *Id.* at 242. This holding, however, results from an interpretation of *McLain* and the jurisdictional requirements of the Sherman Act which would for the first time eliminate the requirement that there be some relationship between the challenged activity and an effect on interstate commerce. Such an interpretation should be rejected.

Initially, the Ninth Circuit's interpretation ignores the "infected" activity analysis upon which the *McLain* ruling was actually based, *id.* at 246, and the Court's reliance upon cases, including *Hospital Building Co.*, *Goldfarb* and *Burke*, which each required a nexus between the alleged restraint and interstate commerce. Second, such an interpretation would render the factual analysis undertaken by this Court in *McLain* superfluous. That brokers assisted in securing financing and insurance from out of state would have been dispositive of the Sherman Act jurisdiction issue if the plaintiff need only assert that the defendant's general business or activity had some relationship with interstate commerce.

Third, such an interpretation ignores this Court's own elucidation of its comment, illuminated in the language and case citations that immediately follow it,<sup>3</sup>

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<sup>3</sup> Immediately following the comment, this Court explained: "The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction

which demonstrate that the statement meant only that a "particularized" showing of an effect on interstate commerce (e.g., that the volume of goods moving in interstate commerce dropped by some amount) was not necessary at the jurisdictional stage. Otherwise a plaintiff would be required to show an *actual* effect, as opposed to an *intended* effect on interstate commerce to state a claim under the Sherman Act. *Id.* at 243.<sup>4</sup>

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required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. See *American Tobacco Co. v. United States*, 328 U.S. 781, 811, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1946); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225, n. 59, 60 S. Ct. 811, 846, 84 L. Ed. 1129 (1940). A violation may still be found in such circumstances because in a civil action under the Sherman Act, liability may be established by proof of either an unlawful purpose or an anticompetitive effect. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436, n. 13, 98 S. Ct. 2864, 2873, 57 L. Ed. 2d 854 (1978); see *United States v. Container Corp.*, 393 U.S. 333, 337, 89 S. Ct. 510, 512, 21 L. Ed. 2d 526 (1969); *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 489, 70 S. Ct. 711, 714, 94 L. Ed. 1007 (1950); *United States v. Socony-Vacuum Oil Co.*, *supra*, 310 U.S., at 224-225, n. 59, 60 S. Ct., at 844-846." *Id.* at 243.

<sup>4</sup> See also P. AREEDA AND H. HOVENKAMP, ANTITRUST LAW ¶232.1, at 238-39 (Supp. 1989) ("McLain language does not compel [an interpretation that the challenged conduct need not be linked to an interstate effect]. At most, it is ambiguous. The quoted dispensation was in the context of refusing to immunize ineffective price-fixing conspiracies. Elsewhere, the court made clear that there must be a nexus, at least 'as a matter of practical economics' between the challenged conduct and interstate commerce").

Thus, a large majority of circuit courts of appeal has concluded that the emphasis of the analysis in *McLain* is that a "particularized" showing of an effect on interstate commerce is not necessary at the jurisdictional stage, but that an allegation of the restraint's effect on interstate commerce is required. See, e.g., *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 723 (10th Cir. 1980) (*en banc*) ("[i]n other words, an elaborate analysis of interstate impact is not necessary at the jurisdictional stage, only an allegation showing a logical connection as a matter of practical economics between the unlawful conduct and interstate commerce. The emphasis of the statement was intended to be that a 'particularized' showing is not necessary, not that a showing of a nexus between unlawful conduct and effect is unnecessary.")<sup>5</sup>

Finally, elimination of the requirement of a nexus between the challenged conduct and interstate commerce

<sup>5</sup> See also *Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank*, 649 F.2d 36, 44-45 (1st Cir. 1981); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 925-26 (2d Cir. 1983); *Hayden v. Bracy*, 744 F.2d 1338, 1342-43 (8th Cir. 1984); *Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985); *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613-14 (6th Cir. 1986); *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411, 427 (7th Cir. 1986); *Sarin v. Samaritan Health Center*, 813 F.2d 755, 758 (6th Cir. 1987); *Thompson v. Wise General Hosp.*, 707 F. Supp. 849, 855 (W.D. Va. 1989), *aff'd*, 896 F.2d 547 (4th Cir.), *petition for cert. filed*, 59 U.S.L.W. 3054 (U.S. Apr. 27, 1990) (No. 90-22). Cf. *Western Waste Serv. v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980). Although containing broad language, the opinion is consistent with this Court's historic analysis, in that it specifically focused its holding on the potential effects on interstate commerce of the challenged activity. The court noted that a substantial amount of purchases from

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would extend the reach of the Sherman Act to virtually every activity, no matter how local. There is no evidence that such an expansion is contemplated by the express language of the Act or was envisioned by Congress. This approach would undoubtedly magnify the already extraordinary volume of cases thrust upon the federal courts, where state court remedies for anticompetitive behavior already exist in virtually every jurisdiction. Graves, *Expanding Federal Antitrust Jurisdiction: A Close Look at McLain v. Real Estate Board, Inc.*, 19 HOUS. L. REV. 143, 168-169 (1981). Indeed, only three states do not have restraint of trade or monopolization statutes of general applicability. 13 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 132.01 (1989). As has often been recognized, "[s]ince every enterprise, however localized, inevitably has some effect, however remote, on the flow of commerce among the states, some 'localness', 'remoteness,' or 'de minimis' factor must intervene or federal regulation is boundless." *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 526 (9th Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); see also Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595, 632-33 (May, 1982) There has been no judicial finding, however, of a Congressional desire to use the Sherman Act to reach every restraint which could affect any commercial activity. See, e.g., *Huelsman v. Civic Center Corp.*, 873 F.2d 1171

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out of state, financing from out of state, payment of management and service fees to an out-of-state company, and remission of revenues to out-of-state sources "could reasonably be expected to fluctuate in direct proportion to Universal's success in conducting its alleged antitrust violations." *Id.* at 1099.

(8th Cir. 1989) (unemployed street vendors did not demonstrate the required nexus with interstate commerce); *Mitchell v. Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, 109 S.Ct. 1123 (1989) (hospital's purchase of supplies from out of state and receipt of revenues from out-of-state public and private insurance programs are insufficient to establish Sherman Act jurisdictional requirements); *Daley v. St. Agnes Hospital*, 490 F. Supp. 1309 (E.D. Pa. 1985) (hospital firing of nurse supervisor has insufficient nexus with interstate commerce); *Hotel Phillips, Inc. v. Journeymen Barbers*, 195 F. Supp. 664 (W.D. Mo. 1961) (price fixing of local barber shops had an insufficient nexus with interstate commerce to invoke Sherman Act jurisdiction), *aff'd*, 301 F.2d 443 (8th Cir. 1962).

In conclusion, a complaint which fails to allege any practical economic relationship between a specified restraint and interstate commerce does not meet the jurisdictional requirements of the Sherman Act. Accordingly, the Ninth Circuit incorrectly determined that *McLain* eliminated the requirement of a practical economic analysis of the effects of the challenged conduct on interstate commerce to determine whether Sherman Act jurisdiction applies.

### III. THE PUBLIC POLICIES ENCOURAGING PEER REVIEW COMPEL APPLICATION OF SHERMAN ACT JURISDICTION ONLY WHERE THE CHALLENGED CONDUCT HAS A SUBSTANTIAL EFFECT ON INTERSTATE COMMERCE

Hospital medical staff peer review consists of those processes designed to "resolve intraprofessionally

matters bearing upon a physician's competency and conduct." *Gill v. Mercy Hospital*, 199 Cal. App. 3d 889, 902, 245 Cal. Rptr. 304, cert. denied, 109 S. Ct. 227 (1988). Its goal is to assist in identifying and disciplining physicians who are incompetent or engage in unprofessional behavior. H.R. REP. NO. 903, 99th Cong. 2nd Sess. 2, reprinted in 1986 U.S. CODE CONG. & AD. NEWS 6384, 6384.<sup>6</sup> Properly limited, it plays no essential or economic role in the practice of medicine. *Id.* at 3, 1986 U.S. CODE CONG. & AD. NEWS at 6385.

To encourage physicians to participate in effective peer review, Congress enacted the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq.*, providing qualified immunity to peer review participants. In the Act, Congress specifically found that "[t]he threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review." 42 U.S.C. § 11101(4)<sup>7</sup>

<sup>6</sup> If California hospitals do not adequately screen and review competence of practitioners to whom they grant privileges, they may be liable for the negligence of such practitioners. *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156 (1982). In California, as a condition of receiving a license to operate, hospitals are required to establish peer review mechanisms. 22 Cal. Code of Regulations § 70703(b).

<sup>7</sup> Respondents are expected to argue that the enactment of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq.*, summarily disposes of the issue of

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Although the facts underlying a specific peer review proceeding may compel a conclusion that it had a substantial effect on interstate commerce,<sup>8</sup> peer review, "in

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Sherman Act jurisdiction in this case, on the theory that Sherman Act jurisdiction is co-extensive with Congress' power to regulate conduct. This analysis is erroneous for two reasons. First, this Court has recognized that "the jurisdictional inquiry under . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974) (citations omitted). Second, the Health Care Quality Improvement Act of 1986 does not regulate peer review activity. Instead, if and when antitrust jurisdiction attaches, its purpose is to provide a shield to protect participants: "this legislation only defines the basis upon which immunity from damages will be granted with regard to professional review actions; where no immunity is claimed under this legislation, no standards regarding professional review actions are established by this legislation." H.R. REP. NO. 903, 99th Cong. 2nd Sess. 13-14, reprinted in 1986 U.S. CODE CONG. & AD. NEWS 6384, 6395.

<sup>8</sup> See, e.g., *Patrick v. Burget*, 486 U.S. 94 (1988), rev'g 800 F.2d 1498 (9th Cir. 1986). Although the Sherman Act interstate commerce requirement was not analyzed in *Patrick*, the underlying fact situation involved a boycott by local physicians of the only general surgeon in a small city in Oregon. Emergency surgical patients were sent to hospitals outside the state instead of to the local general surgeon. 800 F.2d at 1502. If the district court in that case were required to consider the scope of Sherman Act jurisdiction based on the facts before it, the specific facts could well have resulted in a finding that the anticompetitive conduct had a substantial effect on interstate commerce.



general" (App. Pet. A-19) is not an economic activity.<sup>9</sup> Accordingly, there was no basis for the Ninth Circuit to conclude that the existence of peer review activity at a hospital was in and of itself sufficient to create Sherman Act jurisdiction. Such a conclusion is contrary to the view expressed by this Court in *Goldfarb* that although the examination by attorneys of a land title in exchange for money is "commerce" (421 U.S. at 787-88), "there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act" (*id.* at 785-86).<sup>10</sup>

<sup>9</sup> In the legislative history of the Health Care Quality Improvement Act of 1986, Congress recognized that "[u]nlike other activities that may trigger antitrust lawsuits, properly limited peer review plays no essential or important economic role in the practice of medicine. Doctors who are sufficiently fearful of the threat of litigation will simply not do meaningful peer review." H.R. REP. NO. 903, 99th Cong. 2nd Sess. 3, reprinted in 1986 U.S. CODE CONG. & AD., NEWS 6384, 6385.

<sup>10</sup> Cf. *National Soc. of Professional Eng'rs. v. U.S.*, 435 U.S. 679 (1978). In his concurring opinion, Justice Blackmun noted that: "there may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a profession's proper ordering. A medical association's prescription of standards of minimum competence for licensing or certification may lessen the number of entrants. A bar association's regulation of the permissible forms of price advertising for non-routine legal services or limitation of in-person solicitation [citation omitted] may also have the effect of reducing price competition. In acknowledging that 'professional services may differ significantly from other business services' and that the 'nature of the competition of such services may vary,' *ante.* at 1367, but then holding that ethical norms can pass muster under the Rule of Reason only if they promote competition, I

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Eliminating the jurisdictional requirement, so that the challenged activities need not have a substantial effect on interstate commerce, can only serve to increase unnecessarily the burgeoning number of cases brought by private physicians under the antitrust laws challenging peer review activity affecting their hospital staff privileges.<sup>11</sup> As the Seventh Circuit noted in *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985), elimination of the jurisdictional requirement "would mean that virtually every physician who is ever temporarily denied hospital privileges for whatever reason could drag the hospital and members of its staff into costly antitrust litigation merely by alleging that the defendant receives payments, goods, or equipment in interstate commerce." *Id.* at 1283-84. Creating Sherman Act jurisdiction for any physician aggrieved in some respect by medical staff peer review, regardless of the effects on interstate commerce (*e.g.*, a physician who, as the result of peer review, is required to enroll in a continuing education course), would contravene the

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am not at all certain that the Court leaves enough elbowroom for realistic application of the Sherman Act to professional services." *Id.* at 700-01 (Blackmun, J., joined by Rehnquist, J., concurring in part).

<sup>11</sup> See Carlson, *Physician Credentialing Decisions and the Sherman Act*, 18 CUMB. L. REV. 419, 419 (1988) ("Physicians who are denied hospital privileges are increasingly turning to federal antitrust laws for relief"); Note, *Quality of Care, Staff Privileges, and Antitrust Law*, 64 U. DET. L. REV. 505, 506 (1987) ("antitrust litigation involving physician staff privileges has become a very active area"); Comment, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U. PA. L. REV. 121, 122 (1983) (to the same effect).

public policy of encouraging physicians to engage in effective peer review. In almost every case, physician plaintiffs will choose federal antitrust law over available state antitrust law and other remedies because of the threat of treble damages and attorneys' fees, in addition to the attractive prospect of avoiding state law discovery privileges and immunities imposed by the states in regulating their local peer review activities. If federal antitrust law is applicable to all phases of local peer review activity, "[w]hat then remains of state antitrust enforcement?" *Marston v. Ann Arbor Property Managers Ass'n.*, 302 F. Supp. 1276, 1280 (E.D. Mich. 1969), *aff'd*, 422 F.2d 836 (6th Cir.), *cert. denied*, 399 U.S. 929 (1970).

Physician peer review, which seeks to ensure that physicians practicing in local hospitals adhere to the relevant community standard of care, is essential for the protection of patients and the public in general. To interpret Sherman Act jurisdictional requirements in a way which will tend to discourage any participation in peer review because of an unreasonable threat of Sherman Act liability, even where interstate commerce is not directly and substantially affected, contravenes public policy.

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#### IV. CONCLUSION

The Ninth Circuit held that the allegations in the First Amended Complaint are sufficient to meet the jurisdictional requirements of the Sherman Act because: (1) the plaintiff need only prove that the peer review process in general has a not insubstantial effect on interstate

commerce<sup>12</sup>; and (2) all peer review proceedings affect the interstate commerce of Midway. This holding failed to require a nexus between the challenged activity and interstate commerce. It also failed to require any analysis of the economics of the activity under review, thereby substituting an unfounded factual presumption for the required practical, economic, fact-based analysis mandated by the Sherman Act.

The Ninth Circuit holding must be reversed, and the district court dismissal of the First Amended Complaint should be affirmed.

Respectfully Submitted this 10th  
day of August, 1990

J. MARK WAXMAN  
TAMI S. SMASON  
WEISSBURG AND ARONSON, INC.  
Attorneys at Law  
2049 Century Park East  
Suite 3200  
Los Angeles, California 90067  
(213) 277-2223  
Counsel for Petitioners

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<sup>12</sup> The Ninth Circuit neither defined the peer review process "in general," or explained why it selected that activity, without any allegations or factual record, as the relevant activity.



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No. 89-1679

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1989

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER; ARTHUR N. LURVEY; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; MARK KADZIELSKI; and WEISSBURG & ARONSON,  
*Petitioners,*

vs.

SIMON J. PINHAS, M.D.  
*Respondent.*

### ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

#### OPINION BELOW

The Ninth Circuit Opinion in *Pinhas v. Summit Health, Ltd.* is reported at 894 F.2d 1024 (9th Cir. 1989) (the opinion was amended on denial of rehearing on January 25, 1990).



## STATEMENT OF THE CASE

Dr. Simon J. Pinhas ("Dr. Pinhas") initiated this action on May 21, 1987, and filed his First Amended Complaint on July 13, 1987. Dr. Pinhas alleges that each petitioner is engaged in interstate commerce. Together they engaged in a conspiracy to effectuate a boycott and drive Dr. Pinhas out of business in order to capture for themselves a greater share of eye care and ophthalmic surgery in Los Angeles. (Joint Appendix, pp. 3-6; 39.)

The petitioners formed their conspiracy to deprive Dr. Pinhas of hospital staff privileges solely as a method of accomplishing their anticompetitive purpose, and not for legitimate reasons of peer review. The "proximate cause" was an internal dispute over a medical staff rule requiring assistant surgeons to be present at certain eye surgeries. Dr. Pinhas opposed this requirement because it forced him to compensate his competitors for unnecessary work. His competitors benefitted because Dr. Pinhas performed more surgeries than any other ophthalmic surgeon on the staff; the requirement thus served to "redistribute" Dr. Pinhas's income to his competitors. (Joint Appendix, pp. 7-9.)

Instead of supporting Dr. Pinhas, the hospital tried to "buy him off" by offering him a "sham" contract under which the hospital would pay him for "services" which he would not have to perform. Dr. Pinhas rejected this "reimbursement" as dishonest, and in the ensuing dispute the chief of the medical staff threatened to institute disciplinary proceedings if Dr. Pinhas refused to return the "sham" contract. Dr. Pinhas refused. (Joint Appendix, pp. 9-10.)

In furtherance of the conspiracy, the petitioners brought false charges against Dr. Pinhas in order to

cause a summary suspension and termination of his medical staff privileges at Midway Hospital, and then violated his substantive and procedural rights in order to assure an adverse determination on the false charges. Petitioners intended to preclude Dr. Pinhas from practicing at any hospital in California or the rest of the United States by reporting the summary suspension and termination to the Board of Medical Quality Assurance (now the Medical Board of California). They knew that a report of their charges would be disseminated to all hospitals in California and they intended to cause similar action by those hospitals.<sup>1</sup> Without hospital staff privileges, Dr. Pinhas cannot practice surgery, which constitutes the greater portion of his practice. (Joint Appendix, pp. 3-6; 39-41.)

Petitioners' misuse of the peer review process to effectuate the boycott demonstrates that they did not institute the peer review proceedings in a reasonable belief that the action was in furtherance of quality health care; did not make a reasonable effort to obtain the facts of the matter; did not provide Dr. Pinhas with a fair hearing; and did not institute the peer review based upon a reasonable belief that the action was warranted by the facts. (Joint Appendix, p. 41.)

On October 9, 1987, the District Court entered its Order granting petitioners' motion to dismiss the First Amended Complaint without leave to amend. (Joint Ap-

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<sup>1</sup>After the Ninth Circuit issued its amended opinion, Cedars-Sinai Hospital, located about 2 miles from Midway, denied Dr. Pinhas's application for staff privileges based *solely* upon receipt by its medical staff "of a Business and Professions Code 805 Report filed by Midway Hospital . . ." See Appendix A, p. a-3, and explanatory note thereto. Dr. Pinhas intends to amend his Complaint to seek damages as a result of this impact of the Midway peer review proceedings.

pendix, p. 315.) Dr. Pinhas never obtained the right to conduct discovery on the jurisdictional issue, despite his request for that right. (Joint Appendix, p. 241, fn. 7.)

The Ninth Circuit reversed, rejecting petitioners' argument that Dr. Pinhas must make the particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from working. The Ninth Circuit held that Dr. Pinhas

"need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce." (Appendix to the Petition for Writ of Certiorari ("App. Pet.") at A-20, 894 F.2d at 1032.)

### SUMMARY OF ARGUMENT

Ten years ago, this Court issued a unanimous opinion in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 100 S.Ct. 502 (1980) establishing the standard for jurisdiction under the Sherman Act. Unfortunately, a number of lower courts have misinterpreted *McLain*, making it important for this Court to reinforce that decision.

Petitioners (collectively "Summit") devoted their entire brief to criticizing Judge Wiggins's opinion for the Ninth Circuit, claiming that it failed to require a nexus between interstate commerce and the activity "infected" by the antitrust violation, as required by *McLain*. Summit's criticisms miss the mark because it misunderstands the nature of peer review.

Summit provides hospital facilities for use by surgeons and uses the peer review process to control access to that marketplace. Because Summit refuses to acknowledge

peer review as a method of controlling access to the marketplace, it fails to recognize that the Ninth Circuit, based upon a narrow reading of *McLain*, did require Dr. Pinhas to show a nexus between interstate commerce and the "infected" activity, i.e., the peer review proceedings at Midway Hospital.

Summit's Brief fails to provide any alternative to the Ninth Circuit's focus on the "infected" activity. For lack of any alternative under which it might prevail, Summit must perforce argue that Dr. Pinhas is required to show a nexus between interstate commerce and his removal from the hospital staff. This proposed test cannot be reconciled with *McLain* and would frustrate the Congressional goal of free competition.

Because Summit can propose just one test which might require a change in the result below, rejection of that test means that the Ninth Circuit reached the correct result as long as it applied its test properly. The Ninth Circuit correctly decided that Dr. Pinhas could show the required nexus, the effect of the restraint of trade on interstate commerce being indisputable. Summit's provision of hospital services undeniably involves interstate commerce. The peer review process, which controls the admission of physicians to the hospital staff, necessarily affects the provision of hospital services because the hospital can provide its services only through the physicians on its medical staff.

Moreover, Congress exercised its Commerce Clause power to regulate peer review proceedings when it passed the Health Care Quality Improvement Act of 1986 ("HCQIA"). The Commerce Clause also provides the Constitutional basis for the Sherman Act, and the Sherman Act is as inclusive as Congressional power to regulate commerce. For this reason, if Congress can regulate



an activity, courts have jurisdiction under the Sherman Act. The passage of HCQIA therefore confirms the Ninth Circuit's conclusion.

Although the Ninth Circuit reached the correct result, it forced Dr. Pinhas to meet a stricter jurisdictional test than necessary. The Amici States urge this Court to adopt a "general business activities" test for Sherman Act "effect on commerce" jurisdiction. Dr. Pinhas does not need application of that test in order to prevail, but he supports the Amici States and suggests additional considerations in favor of their position in the final section of this Brief.

## ARGUMENT

### I.

#### THE NINTH CIRCUIT DID NOT DEPART FROM *McLAIN* AND PETITIONERS ERR IN CLAIMING THAT IT DID; AN ACCURATE UNDERSTANDING OF THE NINTH CIRCUIT'S OPINION IS ESSENTIAL IN ORDER TO DEFINE THE ISSUES

In *McLain* the petitioners sued six real estate firms, two trade associations, and a class of real estate brokers. The petitioners alleged a conspiracy to fix prices by means of a variety of anticompetitive practices. The lower courts dismissed the action for lack of jurisdiction on the ground that the petitioners failed to demonstrate that the real estate brokers were integral participants in the interstate aspects of real estate transactions.

This Court reversed because the Court of Appeals limited petitioners to an "in commerce" theory of jurisdiction. "It can no longer be doubted, however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the 'in commerce' or the 'effect on

commerce' theory." 444 U.S. at 242. Applying this theory, the petitioners could establish federal jurisdiction by showing "that respondents' activities which allegedly have been infected by a price-fixing conspiracy . . . 'as a matter of practical economics' . . . have a not insubstantial effect on the interstate commerce involved." *Id.* at 246.

According to Summit, the Ninth Circuit departed from *McLain* because it failed to require a factual relationship between the restraint and interstate commerce, did not analyze the practical economic effects of the restraint on interstate commerce, and "ignored" the essential aspect of this Court's analysis in *McLain*. Summit concludes that the Ninth Circuit thereby eliminated the requirement for a "relationship" between the challenged activity and interstate commerce. Petitioners' Brief ("Pet. Br.") pp. 10-11. Before discussing any other issues, Dr. Pinhas must first correct Summit's inaccurate description of Judge Wiggins's opinion; only then can the fundamental points in dispute be identified.

Taking Summit's charges in order, the Ninth Circuit did require a factual relationship between the restraint of trade and interstate commerce, and did analyze the practical economic effects of the restraint on interstate commerce. The Ninth Circuit determined that the peer review process in general at Midway Hospital was the relevant restraint (because Dr. Pinhas alleges that Summit misused this process to effectuate the anticompetitive conspiracy). App. Pet. at A-19, 894 F.2d at 1032. It then found the effect of that restraint on interstate commerce to be "a fact that can hardly be disputed." App. Pet. at A-20, 894 F.2d at 1032. Summit may not agree with the Ninth Circuit's selection of the relevant restraint, or its analysis of the effect of that restraint, but it goes much

too far in accusing the Ninth Circuit of failing to do these things.

Nor can Summit defend its charge that in selecting the relevant restraint, the Ninth Circuit "ignore[d] the 'infected' activity analysis upon which the *McLain* ruling was actually based." Pet. Br. p. 11. In fact, the Ninth Circuit justified its selection of the peer review process as the relevant restraint by paraphrasing and citing the precise passage in *McLain* where this Court used the "infected" terminology (compare the following passage to the language at the top of the page at 444 U.S. 246):

"... Pinhas must show that 'as a matter of practical economics' the activities of the appellees — the peer review process in general — have a 'not insubstantial effect on the interstate commerce involved.' *McLain*, 444 U.S. at 246; 100 S.Ct. at 511." App. Pet. at A-19, 894 F.2d at 1032.

Given these errors by Summit, its conclusion that the Ninth Circuit eliminated the requirement of a nexus with interstate commerce lacks any support. Certainly the Ninth Circuit did not intend to eliminate any nexus requirement. That court explicitly stated:

"Appellees contend that Pinhas's amended complaint fails to establish jurisdiction under the Sherman Act because it does not sufficiently allege 'a required nexus with interstate commerce.' \* \* \*

In order to establish jurisdiction under the Sherman Act, a plaintiff must 'identify a relevant aspect of interstate commerce and then show "as a matter of practical economics" that the Hospital's activities have a "not insubstantial effect on the interstate commerce involved." ' " App. Pet. at A-18 to A-19, 894 F.2d at 1031-1032.

That Summit unfairly criticized the Ninth Circuit does not, of course, resolve the issue. But an accurate assessment of that ruling does allow the parties to focus on the essential points of dispute rather than on such diversions as whether the Ninth Circuit eliminated the nexus requirement.

It appears that Summit contends that the Ninth Circuit (1) erred in identifying the "peer review process in general" at Midway Hospital as the relevant restraining activity (see Section II), and (2) then mis-analyzed the effect of that activity in concluding that the effect of such proceedings on interstate commerce "can hardly be disputed." (See Section III.) These issues are indeed crucial in deciding whether the Ninth Circuit reached the correct result. That it did reach the correct result may suffice for this one case, but this Court should take the opportunity to confirm that Sherman Act jurisdiction is much broader than the Ninth Circuit treated it, reaching as far as the Commerce Clause. (See Section IV.)

## II.

### THE NINTH CIRCUIT APPLIED THE STRICTEST TEST CONSISTENT WITH *McLAIN* AND OTHER COMMERCE CLAUSE DECISIONS WHEN IT IDENTIFIED THE RELEVANT RESTRAINT ON COMMERCE

The crux of the dispute is how to identify the relevant activity which must be tested for its effect on interstate commerce. The selection of the relevant activity can itself determine the likelihood of finding a substantial effect on interstate commerce — a court which focuses on the general business activities of a sugar refiner likely will find a substantial effect on interstate commerce, while one which looks at the sale of a single bag of price-fixed sugar surely



will not. See *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996 (1948).

Although Summit's Brief nowhere identifies what activity the Ninth Circuit should have examined, it argued below that the inquiry should be limited to the removal of Dr. Pinhas from the hospital staff. The lack of any alternative which would avail it, forces Summit to adopt this position here. Summit's proposed test is inconsistent with *McLain* and other authority, and would inhibit the important Congressional policy of encouraging free competition.

#### A. What Are The Possible Relevant Activities Which Must Have A "Nexus" With Interstate Commerce?

Commentators have identified a spectrum of possible methods for identifying the relevant activity which "affects" interstate commerce. Ranging from broad to narrow, these include:

(a) **The General Business Activities Test.**<sup>2</sup> Under this test, if Summit's general business activities have a not insubstantial effect on interstate commerce, courts have jurisdiction under the Sherman Act.

<sup>2</sup>E.g., Note, *The Interstate Commerce Test For Jurisdiction In Sherman Act Cases And Its Substantive Applications*, 15 Ga.L.Rev. 714, 715 esp. fn. 6 (Spring 1981); Comment, *Sherman Act "Jurisdiction" In Hospital Staff Exclusion Cases*, 132 U.Pa.L.Rev. 121, 132-134 (December 1983); Havighurst, *Doctors And Hospitals: An Antitrust Perspective On Traditional Relationships*, 1984 Duke L.J. 1071, 1142-1144; Trail and Kelley-Claybrook, *Hospital Liability And The Staff Privileges Dilemma*, 37 Baylor L.Rev. 316, 350 (Spring 1985); Comment, *A Case Of Judicial Backsliding: Artificial Restraints On The Commerce Power Reach Of The Sherman Act*, 1985 Ill.L.Rev. 163, 180-182; Mann, *The Affecting Commerce Test: The Aftermath Of McLain*, 24 Houston L.Rev. 849 (October 1987).

(b) **The Infected Activities Test.**<sup>3</sup> Under this test, the court considers a reasonable general category which encompasses the particular wrongful conduct. This test therefore emphasizes only those general activities in which the violation occurred.

(c) **The Particular Wrongful Conduct Test.**<sup>4</sup> To establish jurisdiction under this test, Dr. Pinhas would have to show that the alleged wrongful conduct itself, against him personally, had a substantial effect on interstate commerce.

As noted above, the Ninth Circuit adopted the middle test, concluding that the alleged boycott "infected" the "peer review process in general." Since application of the "general business activities" test would certainly result in jurisdiction — Summit's 1989 10K<sup>5</sup> describes it as "a health care company, which at June 30, 1989 operated 21 acute care hospitals, with a total of 2,977 licensed beds, and 17 nursing facilities, with a total of 2,230 licensed beds in California, Texas, Arizona, Iowa, Colorado, and in

<sup>3</sup>E.g., Kissam, Webber, Bigna & Holzgraeffe, *Antitrust and Hospital Privileges: Testing The Conventional Wisdom*, 70 Cal.L.Rev. 595, 632 (May 1982); Mann, *The Affecting Commerce Test: The Aftermath Of McLain*, 24 Houston L.Rev. 849, 864-871 (October 1987).

<sup>4</sup>E.g., Comment, *Sherman Act "Jurisdiction" In Hospital Staff Exclusion Cases*, 132 U.Pa.L.Rev. 121, 139-141 (December 1983); Havighurst, *Doctors And Hospitals: An Antitrust Perspective On Traditional Relationships*, 1984 Duke L.J. 1071, 1142-1144; Comment, *A Case Of Judicial Backsliding: Artificial Restraints On The Commerce Power Reach Of The Sherman Act*, 1985 Ill. L.Rev. 163, 182-184.

<sup>5</sup>Form 10-K dated as of September 29, 1989, and filed with the Securities and Exchange Commission. Copies of the first two pages are attached as Appendix B (see p. b-3). Pursuant to F.R.E. 201, Dr. Pinhas requests that this Court take judicial notice of these facts. See also Joint Appendix, pp. 2-3.

the Kingdom of Saudi Arabia" — Summit can prevail only by arguing that the Ninth Circuit erred in failing to focus on the particular conduct directed solely against Dr. Pinhas.<sup>6</sup>

**B. The Ninth Circuit Properly Rejected Petitioners' Proposed "Particular Wrongful Conduct" Test.**

Summit actually made such an argument to the Ninth Circuit, which rightly rejected it:

"Appellees' primary contention is that interstate commerce will not be affected by the removal of Pinhas from the hospital staff.

. . .

Pinhas need not, as appellees apparently believe, make the more particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from working. [*McLain*,] at 242-43, 100 S.Ct. at 509. . . . Appellees' contention that Pinhas failed to allege a nexus with interstate commerce because the absence of Pinhas' services will not drastically affect the interstate commerce of Midway therefore misses the mark and must be rejected." App. Pet. at A-19 to A-20, 894 F.2d at 1031-1032 (footnote omitted).

<sup>6</sup>Even if Summit convinces this Court to adopt its preferred test, that would not justify dismissal of Dr. Pinhas's action. *McLain*, 444 U.S. at 246-247; *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 724-725 (10th Cir. 1981). See also, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 602 (9th Cir. 1976) ("... it seems settled that, when a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiffs' substantive claim for relief, a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous.")

In reaching this conclusion, the Ninth Circuit again took its guidance from *McLain*. In the passage cited by the Ninth Circuit, this Court explicitly stated:

"To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases." 444 U.S. at 242-243, 100 S.Ct. at 509.

The Ninth Circuit plainly understood this passage from *McLain* as rejecting Summit's particular wrongful conduct test. Summit's counter-interpretation of *McLain* cannot withstand scrutiny, and its indirect effort to substitute its test by criticizing the Ninth Circuit fails because it misunderstands Judge Wiggins's opinion. Summit so constrains jurisdiction that the Tenth Circuit, whose opinions Summit cites favorably, recently rejected Summit's "particularized" test.<sup>7</sup> Finally, Summit's test, if adopted, would divorce the Sherman Act from its recognized jurisdictional base.

<sup>7</sup>*Anesthesia Advantage, Inc. v. The Metz Group*, 1990-2 Trade Cas. (CCH) ¶ 69,144 (10th Cir. 1990), discussed below.



### 1. This Court Rejected Petitioners' Test in *McLain*.

Summit's principal difficulty is that *McLain* both explicitly and implicitly rejects its test. Implicitly because Summit's test, by limiting the inquiry to the impact on the particular plaintiff, tends to link interstate commerce only with the business activities of the plaintiff, not the defendants. Yet *McLain* relied solely on the interstate commerce effect of the defendants' activities. Moreover, the Third Circuit reversed a district court decision analyzing only the plaintiff's activities. *Cardio-Medical Assoc., Ltd. v. Crozer-Chester Med. Center*, 721 F.2d 68, 74-75 (3d Cir. 1983).

Because the Ninth Circuit understood *McLain*'s explicit words to reject Summit's test, Summit must also suggest that the following two sentences have some interpretation other than their plain meaning as understood by the Ninth Circuit:

"To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful." 444 U.S. at 242-243.

Summit argues that the second sentence does not, as it seems, reject its favored test, but merely eliminates the need for an elaborate analysis of the interstate impact at this stage of the litigation. (Pet. Br. 11-13.) By focusing on the second sentence, Summit ignores the one immediately preceding it. That first sentence cannot be reconciled with a "particular wrongful conduct" test, because it

required the petitioners in *McLain* only to demonstrate a substantial effect on interstate commerce "generated by respondents' brokerage activity" (not "generated by the particular wrongful act which affected each petitioner"). Summit's proposed interpretation of the second sentence is simply irrelevant because the first sentence alone defeats its test.

If Summit could ignore the first sentence, it might be able to argue that the second sentence only eliminated the need for a detailed analysis of the interstate impact. Such an interpretation would be plausible if this Court had revised its sentence to read, "Petitioners need not make the [a] more particularized showing of an [the] effect . . ." Without these changes, the plain meaning of the sentence rejects the particular wrongful conduct test in favor of the broader test announced in the previous sentence.

Other language in *McLain* confirms that the Ninth Circuit read it correctly. For example, at the top of page 246 this Court re-stated the test as requiring a not insubstantial effect on interstate commerce caused by "respondents' activities which allegedly have been infected by a price-fixing conspiracy". Dr. Pinhas understands the quoted phrase, in context, to refer to the respondents' real estate brokerage activities in general, rather than to a particular wrongful act (fixing brokerage fees).

If this Court had applied Summit's test in *McLain*, the petitioners there would have lost. Summit's attempt to force Dr. Pinhas to show effects arising solely from the impact of the wrongful conduct on him, must be rejected as contradicting the express language of *McLain*.

2. The Ninth Circuit Did Not Apply A General Business Activities Test, Contrary To Petitioners' Claims. Instead, It Recognized Petitioners' Use Of Peer Review As A Device To Control Market Access And Treated That As The "Infected" Activity.

In Section I, Dr. Pinhas corrected Summit's claims that the Ninth Circuit ignored the "infected" activity language in *McLain* and that the Ninth Circuit's interpretation would render superfluous the factual analysis contained in *McLain*. (Pet. Br. 11.) Summit apparently makes these mistakes because it refuses to acknowledge that peer review controls access to the facilities a surgeon needs in order to practice. Because Summit insists that peer review is a "non-economic" activity, and therefore cannot form part of the nexus, it wrongly concludes that the Ninth Circuit must have applied a general business activities test. In fact, the Ninth Circuit carefully identified the "infected" activity and analyzed the interstate commerce impact of that activity only. Thus, two of Summit's arguments in support of its position miss the mark because it mischaracterizes the Ninth Circuit's ruling as applying a general business activities test.

Summit makes the same mistake in its arguments at Pet. Br. 13-15. Here, Summit argues that the Ninth Circuit's purported elimination of a nexus requirement would unduly expand the reach of Federal regulation and would "magnify the volume" of cases "thrust" upon the Federal courts. Since the Ninth Circuit did no such thing, both arguments fail by starting from a false premise.<sup>4</sup>

<sup>4</sup>Even if the Ninth Circuit had not required a nexus, Summit's arguments should be rejected. Summit has mis-directed its "federalism" argument. The Sherman Act provides no basis from which to expand the scope of Federal power; as shown below, its reach

3. The Tenth Circuit, The Court On Whose Opinion Petitioners Rely, Also Rejects Their Proposed Test.

The Tenth Circuit, whose opinion in *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980) Summit cites with approval, has rejected Summit's "particularized" test. *Anesthesia Advantage, Inc. v. The Metz Group*, 1990-2 Trade Cas. (CCH) ¶ 69,144 (10th Cir. 1990), involved Sherman Act claims by nurse anesthetists against physician anesthesiologists. The defendants allegedly caused certain hospitals to adopt rules discriminating against the plaintiffs in order to gain a competitive advantage. Faced with a challenge to jurisdiction, the plaintiffs showed that the hospitals received supplies and equipment, patients, and insurance payments in interstate commerce. The defendants argued that this evidence pertained only to their general business activities and did not suffice. The Tenth Circuit disagreed:

"We reject defendants' assertion that plaintiffs must make the more particularized showing of how indi-

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depends entirely on that of the Commerce Clause. Because the Ninth Circuit stayed far within the boundaries defining the power to regulate commerce, its decision in no way impacts considerations of "federalism".

Summit's "floodgates" argument assumes that there is such a thing in the abstract as "too many lawsuits." But some cases have merit, others don't. Summit provides no sieve to sort them. Moreover, the "floodgates" argument is peculiarly inappropriate given the context of this case, because in 1986 Congress passed the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. § 11101 *et seq.* In Section 11111, Congress specifically granted immunity for Sherman Act (and other) liability arising out of peer review proceedings, provided that the affected physician receives certain fundamental rights denied to Dr. Pinhas. Since Congress constructed this dike, this Court need not build additional levees.



vidual patients of the individual defendant physician anesthesiologists received anesthesia services in which particular out-of-state anesthesia supplies or equipment were used or for which particular out-of-state insurance payments were made." ¶ 69,144 at p. 64,287.

By its criticism of the general business activities test, Summit implicitly suggests that the Ninth Circuit looked only at its general business activities, the same mistake made by the defendants in *Anesthesia Advantage*. Summit tries to force Dr. Pinhas to meet an overly restrictive test that looks only to the particular acts affecting him, the same mistake made by the defendants in *Anesthesia Advantage*. Summit's misconstruction of what the Ninth Circuit actually did, has forced Summit to take an extreme position rejected even by a court supposedly favorable to its view of *McLain*.

#### 4. The Sherman Act Is Merely A Means By Which Congress Regulates Commerce. Petitioners' Test Would Create An Unwarranted Distinction Between This Particular Method Of Regulation And Other Congressional Regulations.

Summit's test would create an unwarranted distinction between the enforcement of the Sherman Act and Congressional power to regulate interstate commerce. Congressional power to enact the antitrust laws arises out of the Commerce Clause, Article I, Section 8. *Atlantic Cleaners & Dryers v. United States*, 286 U.S. 427, 434, 52 S.Ct. 607, 609 (1932). "Congress, in passing the Sherman Act,

left no area of its constitutional power unoccupied; it 'exercised "all of the power it possessed." ' " *United States v. Frankfort Distilleries*, 324 U.S. 293, 298, 65 S.Ct. 661, 664 (1945). Because the Sherman Act has its source in the Commerce Clause, and because it is as inclusive as the Commerce Clause, it is nothing other than a method by which Congress has chosen to exercise its undoubted power to regulate interstate commerce.

This Court has consistently upheld Congressional power to regulate commerce directly, even in cases in which the particular individual who suffered the wrong could not meet Summit's test. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348 (1964); *Katzenbach v. McLung*, 379 U.S. 294, 85 S.Ct. 377 (1964); *Perez v. United States*, 402 U.S. 146, 150-156, 91 S.Ct. 1357, 1359-1362 (1971); and *Russell v. United States*, 471 U.S. 858, 105 S.Ct. 2455 (1985). In each of those cases, this Court upheld actions of Congress which affected a *class* of persons, without reference to the effect of the wrongful conduct on the particular individual. "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez*, 402 U.S. at 154, 91 S.Ct. at 1361.

Summit's test would restrict the right of Congress to regulate analogous activities through its chosen vehicle for regulation, the Sherman Act. In this very case, Summit objects that the Ninth Circuit looked at the peer review process in general (part of a "class of activities") instead of the individual instance of Dr. Pinhas. But no principled basis exists to distinguish between Congressional power to regulate directly (under which Summit's test has been rejected) and Congressional power to regulate indirectly, via private enforcement actions and crimi-

nal sanctions, when both forms of regulation arise out of the same Constitutional source.<sup>9</sup>

Summit's criticisms of the Ninth Circuit must be rejected as inconsistent with *McLain* and the fundamental Congressional policy of supporting free enterprise.<sup>10</sup> The

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<sup>9</sup>Summit attempts to rebut this argument in footnote 7 of its Brief by citing to this Court's decision in *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 197 n.12, 95 S.Ct. 392, 399 (1974). Summit contends that *Gulf Oil* recognized a distinction between the jurisdiction of Congressional regulators and the jurisdiction of the judicial enforcers of Congressional regulations, notwithstanding the fact that the jurisdiction of each arises from the Commerce Clause. A brief review of *Gulf Oil* will show that Summit's contention is unfounded.

In that case, the petitioner argued that because Congress had regulated interstate roads and railroads, the manufacturer of materials used in construction of such roads must, as a matter of law, be deemed "in" interstate commerce. The petitioner had to prove that such articles were "in" interstate commerce, because it sued under Section 1 of the Clayton Act, 15 U.S.C. § 12. The Clayton Act contains solely the "in commerce" language and therefore differs from Section 1 of the Sherman Act, which includes within its scope matters "affecting" commerce. *Id.* at 194-195. The manufacturers of road materials may well have "affected" interstate commerce, but they were not "in" that commerce and therefore could not be regulated under the Clayton Act. This Court specifically contrasted the Sherman Act, in which Congress intended to exercise all of its Constitutional power, with the Clayton Act and the Robinson-Patman Act, where no such intent appeared. *Id.* at 194-195; 199-203. Thus, the distinction rested not with the forum deciding the merits — Congress versus the courts — but with the limited language of the Clayton Act.

<sup>10</sup> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete — to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can

rejection of the only test which would avail Summit leaves for determination the issue whether the Ninth Circuit properly held that Dr. Pinhas could meet the test which it applied.

### III.

#### THE NINTH CIRCUIT CORRECTLY DECIDED THAT PEER REVIEW PROCEEDINGS AFFECT INTERSTATE COMMERCE

The Ninth Circuit also held that Dr. Pinhas could meet the "infected activities" test:

"He need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce." App. Pet. at A-20, 894 F.2d at 1032.

Summit offers no "intensely practical, case-by-case review of the facts presented" (Pet. Br. 4) that would indicate why it is logically or factually unlikely that peer review affects interstate commerce. Instead, it offers two policy arguments against applying the antitrust laws to peer review activities.

As one policy justification, Summit reiterates (Pet. Br. 19-20) the "floodgates" argument refuted above (see fn. 8). In addition to the points mentioned earlier, Dr. Pinhas notes that Summit's "floodgates" argument raises very serious policy concerns. Summit wants to use a jurisdictional test to curb access to Federal courts. But because the Sherman Act reaches as far as the Commerce Clause, any restriction on Sherman Act jurisdiction will

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muster." *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135 (1972) (emphasis added).



inevitably be construed as limiting the scope of Congressional power to regulate commerce. This makes a jurisdictional test far too blunt an instrument for curtailing access to the courts.

Summit also argues (Pet. Br. 15-18) that peer review is a non-economic activity essential for the protection of parties and the public.<sup>11</sup> This assertion lends itself to two interpretations. It may mean only that a properly conducted peer review is not motivated by economic considerations. This merely changes the focus of the debate to the motives of the petitioners here, an issue not presented and hardly one which would justify dismissal of Dr. Pinhas's action. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S.Ct. 486, 491 (1962).

It may also mean that the peer review process is "immune" to "infection" by wrongful activities. If so, it is inherently incapable of being used for an economic purpose. This implies that peer review does not fall within the definition of "trade or commerce" as used in the Sherman Act, thus rendering physicians who participate in it immune from suit under the Sherman Act. We must reject this approach (and a corollary to it) before showing that the Ninth Circuit correctly decided in favor of Dr. Pinhas.

#### A. Peer Review Is An Economic Activity.

In describing hospital peer review as "non-economic", Summit focuses so closely on the *process* of peer review that it ignores its *impact*. Like other forms of professional regulation, peer review inevitably impacts the economics

<sup>11</sup>Amici Hospital Associations make this point the focus of their brief.

of the medical profession because it controls access to the marketplace.

Hospital staff membership provides the physician with several competitive advantages over non-members. Surgeons must have access to high technology equipment and highly trained support staff. Those with staff privileges can practice their specialty, those without them cannot. Dolan & Ralston, *Hospital Admitting Privileges And The Sherman Act*, 18 Houston L. Rev. 707, 713 (May 1981) ("Dolan & Ralston"); Joint Appendix, pp. 40-41. Even for other specialties, "the absence of admitting privileges is a competitive disadvantage, if for no other reason than it connotes a second-class practitioner." Dolan & Ralston, at 714. Moreover, physicians on staff gain access to referrals from other physicians and to new patients via the emergency room. *Id.* Thus, "physicians with privileges in a given area of practice have a competitive advantage over those without privileges." *Id.*

Peer review obviously results in a direct economic impact on the physician.<sup>12</sup> But the indirect effects can be even more damaging:

"Although there may be more than one hospital in the relevant geographic market, excluding a physician from one hospital often leads to exclusion from other hospitals. Moreover, exclusion by one hospital may lead to disciplinary investigation by local medi-

<sup>12</sup>"Peer review recommendations denying, restricting or revoking privileges can provoke anger and can have a significant adverse economic impact on the affected physician." Brief of the American Medical Association, American Hospital Association, Joint Commission on Accreditation of Healthcare Organizations, Oregon Medical Association, Oregon Association of Hospitals, and American Medical Peer Review Association as Amici Curiae in Support of Respondents, pages 6-7, *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658 (1988).

cal boards and thus further impede an excluded physician's ability to practice medicine." Drexel, *The Antitrust Implications of the Denial of Hospital Staff Privileges*, 36 U. Miami L.Rev. 207, 231 (Jan. 1982) ("Drexel") (footnotes omitted).

This result is not fortuitous. California Business & Professions Code § 805 requires hospitals, under threat of criminal penalties, to report to the relevant licensing agency instances of denial, revocation, or restriction of staff privileges by a peer review body. Section 805.5 requires other hospitals, again under threat of criminal penalties, to obtain copies of any "805 Reports" before granting or renewing staff privileges. Congress has now established a national data bank for similar reports, making the impact national. HCQIA, 42 U.S.C. § 11131 et seq.<sup>13</sup>

Any peer review decision inherently affects the marketplace. Although it is perhaps not strictly relevant at this stage of the litigation, Dr. Pinhas wants there to be no misunderstanding: he does not contend that this inevitable impact of the process alone constitutes the substantive violation of the Sherman Act. Instead, the impact creates the relevant nexus with interstate commerce, while the substantive violation consists of the impact combined with Summit's abuse of peer review to exclude him from the market.

The potential for such abuse stems from a physician's dual role on a medical staff. Primarily, of course, a physician uses the hospital facilities to treat patients. But the physician must also function as a member of the

<sup>13</sup>These provisions directly affect Dr. Pinhas. As noted in footnote 1, *supra*, another Los Angeles hospital, Cedars-Sinai, has already denied him staff privileges based upon the Midway 805 Report.

medical staff. The medical staff assumes responsibility for the quality of patient care. As part of this group, a physician participates in the credentialing of other members and prospective members of the medical staff. See generally, Comment, *Medical Staff Membership Decisions: Judicial Intervention*, 1985 Ill. L. Rev. 473, 476-479.

This dual role creates obvious economic incentives. "[T]he decision to grant privileges in one's own specialty or subspecialty involves the diminution of one's own competitive advantage. \* \* \* Therefore, a strong incentive exists to limit the number of people in one's own specialty or sufficiently related specialties. . . ." Dolan & Ralston, *supra*, at 715. No wonder that commentators conclude that "[a]n inherent conflict of interest therefore predominates the hospital privilege decision-making process." Comment, *Medical Staff Membership Decisions: Judicial Intervention*, 1985 U.Ill. L. Rev. 473, 478 (footnote omitted).<sup>14</sup>

Summit may argue that this description of the process overemphasizes the role of the medical staff, when it is the hospital board which makes the final decision on staff privileges. This argument again confuses process with impact. Dr. Pinhas need only show an effect on interstate

<sup>14</sup>Kissam, et al. note that there is "good reason for antitrust courts to regard medical staff recommendations on privilege questions as suspect and deserving of careful judicial scrutiny." Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Cal.L.Rev. 595, 610 (May 1982). See also Havighurst, *Doctors and Hospitals: An Antitrust Perspective On Traditional Relationships*, 1984 Duke L.J. 1071, 1122 ("Because courts in privilege cases have not fully recognized the significance of competitor control, there is danger that their approach will sometimes be too deferential or not sufficiently penetrating to discover and penalize abuses by the medical staff of its dominant position."); Drexel, *supra*, at 223-224; and Dolan & Ralston, *supra*, at 752.



commerce, which exists regardless of who makes the decision. Peer review, by its very nature, has an effect on the relevant market (eye surgery).

**B. This Court Need Not Create A Special Exemption For Peer Review From Sherman Act Scrutiny Because Congress Has Already Acted To Preserve The Public Benefits of Peer Review.**

If this Court were to treat peer review as a non-economic activity, not within the meaning of "trade or commerce", it would restore the "professionalism" defense rejected in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004 (1975) and *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355 (1978). No reason exists to confer such preferred status on hospitals or their physicians engaging in peer review<sup>15</sup>

Dr. Pinhas understands that certain professional regulatory activities may not be treated as violations of the Sherman Act if the public benefits flowing from them are seen as outweighing their anti-competitive aspects. *Goldfarb*, 421 U.S. at 788 n.17 (1975). Summit suggests such an argument in its opening Brief (footnote 10). But Congress has already made its judgment and weighed the anti-competitive impact of peer review proceedings against the public benefit. HCQIA explicitly recognizes the need for peer review (42 U.S.C. § 11101) and balances it against the potential for abuse (42 U.S.C. § 11112).<sup>16</sup>

<sup>15</sup> "Staff privileges issues are therefore appropriately considered without regard to any separate professionalism defense." Havighurst, *Doctors and Hospitals: An Antitrust Perspective On Traditional Relationships*, 1984 Duke L.J. 1072, 1104.

<sup>16</sup> See also H.R. Rep. No. 99-903, 99th Cong. 2d Sess. 9, reprinted in 1986 U.S. Code Cong. & Admin. News 6384, 6391, and see introduc-

This Congressional solution to an inherently legislative problem obviates the need for this Court to create any "implied exception" to the Sherman Act, *Goldfarb, supra*, 421 U.S. at 786-788.

**C. The Peer Review Process In General Indisputably Affects Interstate Commerce.**

Having disposed of Summit's policy defenses, Dr. Pinhas can now do what Summit did not do, viz., make a practical analysis of the Ninth Circuit's conclusion that the peer review process affects interstate commerce. The Ninth Circuit followed exactly the route taken in *McLain*. This Court did not engage in a detailed factual analysis relating real estate brokerage activities to interstate commerce.<sup>17</sup> Instead, it recited the logical connection between brokerage activities and interstate commerce:

"Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that

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tory remarks by the sponsor of HCQIA, Rep. Henry Waxman, during the floor debate on HCQIA: "The limited immunity provided under this bill is essential to encourage physicians and hospitals to participate in conducting effective peer review. The immunity provisions have been restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions that violate civil rights laws or actions that are really taken for anticompetitive purposes will not be protected under this bill." (132 Cong. Rec. H9957 [daily ed. Oct. 14, 1986].)

<sup>17</sup> It did recite in detail the facts demonstrating that other aspects of real estate sales (e.g., mortgage loans and title insurance) involve interstate commerce.

on this record are shown to have occurred in interstate commerce." 444 U.S. at 246.

Just as obviously, the peer review process, by affecting all the physicians, affects the provision of hospital services needed by surgeons. As noted above, Summit is in no position to argue that its provision of hospital services does not involve interstate commerce.<sup>18</sup> Thus, the Ninth Circuit only commented on the irresistible force of the logic when it stated that the effect on interstate commerce was "a fact that can hardly be disputed."

Even if Summit tried to dispute the obvious, the basic principles of Sherman Act jurisdiction support the Ninth Circuit's conclusion. Because Congress uses the Sherman act as a method of regulating commerce, "The reach of the Sherman Act is 'as inclusive as the constitutional

<sup>18</sup>As long ago as 1976, the Federation of American Hospitals argued, in an amicus brief filed in *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 96 Ct. 1848 (1976),

"[T]he conclusion reached by the Court of Appeals is unrealistic in view of the health care delivery system which presently exists in the United States. Today, conduct which affects the rendition of hospital services automatically affects the goods, services and activities which makes the delivery of those very hospital services possible.

• • •

Because the operation of Mary Elizabeth, and hospitals like it, results in considerable involvement in interstate commerce, and because the provision of hospital services is inseparable from such interstate involvement, the effect of conduct which restrains the rendition of those hospital services necessarily has a direct and substantial effect on interstate commerce." Brief, Amicus Curiae, filed on behalf of the Federation of American Hospitals, *Hospital Building Company v. Trustees of the Rex Hospital*, at pages 7-8. See also pp. 15, 21, 26, and 27.

limits of Congress' power to regulate commerce.' Report of the Attorney General's National Committee to Study the Antitrust Laws 62 (1955)." *Rasmussen v. American Dairy Association*, 472 F.2d 517, 521 (9th Cir. 1973); *Musick v. Burke*, No. 89-55310 (9th Cir. Sept. 7, 1990).

If Congress can regulate an activity under the Commerce Clause, it can regulate it under the Sherman Act. "In resolving the jurisdictional issue, our task is to assume, without deciding, that the conduct complained of constitutes a violation of the Sherman Act and then to determine whether that conduct could be regulated under the commerce power." *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1096 (9th Cir. 1980) (Kennedy, J.); *Rasmussen, supra*. Thus, the Ninth Circuit properly concluded that the peer review proceedings in general affect interstate commerce if Congress can regulate the peer review proceedings in general.

There can be little doubt that Congress possesses such power. Congress certainly believed that it did when it enacted HCQIA. If the Ninth Circuit erred in concluding that Midway's peer review proceedings in general form part of a class of activities affecting interstate commerce, *Perez, supra*, then the logical consequence of that error is that Congress also erred in believing that it has the constitutional authority to regulate those peer review proceedings. If so, then the only recourse is to declare HCQIA unconstitutional as beyond the scope of Congress's authority.<sup>19</sup>

<sup>19</sup>Summit suggests in footnote 7 of its Brief that HCQIA does not "regulate" peer review. Dr. Pinhas has no desire to engage in a semantic debate over the definition of "regulate". He submits that the establishment of detailed procedural standards combined with mandatory reporting of peer review results can fairly be characterized as "regulation". In any event, the key point is that Congress



## IV.

**THIS COURT SHOULD DIRECT LOWER COURTS  
TO STOP FRUSTRATING CONGRESSIONAL IN-  
TENT BY IMPOSING ARTIFICIAL BARRIERS TO  
JURISDICTION UNDER THE SHERMAN ACT**

Although Dr. Pinhas can and should prevail under the test imposed on him by the Ninth Circuit, he does not believe this Court should limit itself to that test or the strict confines of this case. Instead, he urges that this Court state in the most explicit possible terms that jurisdiction under the Sherman Act is co-extensive with Congressional power under the Commerce Clause.

Several commentators have noted that "[w]hereas the United States Supreme Court has engaged in a continual . . . trend towards expanding the jurisdictional reach of the Sherman Act, the lower courts have undermined this tendency by adopting conflicting interpretations of the Supreme Court's decisions." Mann, *The Affecting Commerce Test: The Aftermath of McLain*, 24 Houston L.Rev. 849, 850 (Oct. 1987) (footnotes omitted). This tendency is particularly evident in hospital staff privileges cases:

"Despite the clear trends described above, many plaintiffs in hospital staff exclusion cases still are not given the opportunity to proceed to the merits of their cases because of summary dismissals on 'jurisdictional' grounds. Those 'jurisdictional' hurdles

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could only justify HCQIA pursuant to its Commerce Clause authority (note the findings in § 11101). Summit's attempt to distinguish HCQIA as a mere immunity statute for antitrust actions ignores the reporting provisions of § 11131 et seq. and also the fact that § 11111 grants immunity under *all* laws, State or Federal (a grant possible only if Congress exercises Commerce Clause authority).

frustrate the expressed liberal policy of the Supreme Court in applying the interstate commerce requirement, defeat the remedial purpose of the antitrust laws in the health care field, and retard the policy of opening that field to the free play of market forces and the beneficial effects of free and open competition." Comment, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U.Pa.L.Rev. 121, 135 (Dec. 1983) (footnotes omitted).<sup>20</sup>

Although Summit and a number of lower courts have supported summary dismissal by reference to language contained in *McLain*, Dr. Pinhas does not believe that ambiguity within that opinion caused the problem. "Despite the reliance on language quirks within *McLain*, most of the confusion apparently emanates less from the opinion than from a fundamental refusal by lower federal courts to accept Sherman Act jurisdiction as co-extensive with the commerce power." Comment, *A Case Of Judicial Backsliding: Artificial Restraints On The Commerce Power Reach Of The Sherman Act*, 1985 Ill.L.Rev. 163, 181-182. This Court has the opportunity, by the opinion it will render here, to put an end to this "judicial backsliding."

In proposing the test described below, Dr. Pinhas is guided by three basic principles. First, Congressional

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<sup>20</sup>Such decisions include *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980); *Furlong v. Long Island College Hospital*, 710 F.2d 922 (2d Cir. 1983); *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984); *Seglin v. Esau*, 769 F.2d 1274 (7th Cir. 1985); *Stone v. William Beaumont Hosp.*, 782 F.2d 609 (6th Cir. 1986); *Doe v. St. Joseph's Hosp. of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986); *Sarin v. Samaritan Health Center*, 813 F.2d 755 (6th Cir. 1987); *Thompson v. Wise General Hosp.*, 707 F. Supp. 849 (W.D. Va. 1989), *aff'd* 896 F.2d 547 (4th Cir. 1990); and *Mitchell v. Frank R. Howard Mem. Hosp.*, 853 F.2d 762 (9th Cir. 1988) *cert. denied*, 109 S.Ct. 1123 (1989).

power both to regulate commerce and to enact the Sherman Act, arises out of the Commerce Clause. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495, 60 S.Ct. 982, 993 (1940). Second, this Court has recognized for many years that in enacting the Sherman Act, Congress intended to exercise all of its authority under the Commerce Clause. *United States v. Frankfort Distilleries*, 324 U.S. 293, 298, 65 S.Ct. 661, 664 (1945). That authority is extensive: "The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119, 62 S.Ct. 523, 526 (1942).

Third, the Sherman Act itself is merely a vehicle or method by which Congress exercises its authority under the Commerce Clause; the Sherman Act is a means of regulating commerce. Congress, having established a national policy of free competition, *Apex Hosiery, supra*, 310 U.S. at 493 esp. n. 15, 60 S.Ct. at 992, cannot itself serve as a watchdog over every aspect of the national economy. Congress therefore created criminal penalties by which the Attorney General could enforce patterns of free trade, and civil penalties so that those who are themselves engaged in interstate commerce, or affected by it, can also guard the free flow of commerce. If Congress can regulate the activity directly, then no reason exists in law or policy to preclude indirect regulation of the same activity via the Sherman Act. See *Rasmussen, supra*, and *Western Waste, supra*.

This Court has long recognized that Congress may regulate any activity, no matter how local, which burdens or inhibits interstate commerce:

"But even if appellee's activity be local *and though it may not be regarded as commerce*, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'." *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 89 (1942) (emphasis added). See also *Wrightwood Dairy, supra*.

The obvious reason for this is that economic activities cannot be neatly segregated as "interstate" and "non-interstate". For example, a company may use the profits of an intrastate enterprise to subsidize sales interstate. The local activities inevitably affect the profitability of the business as a whole, and thus those portions of it transacted interstate. By the same token, one anticompetitive act in a local market inevitably benefits the business as a whole, thereby subsidizing its efforts to compete in a larger free marketplace. Thus, if a firm's general business activities substantially affect interstate commerce, that fact alone provides the relevant nexus with interstate commerce. *McLain; Musick v. Burke*, No. 89-55310 (9th Cir. Sept. 7, 1990).



## V.

## CONCLUSION

This Court has not sustained a lower court's jurisdictional dismissal under the Sherman Act since 1947, i.e., prior to the application of the "affecting commerce" test to Sherman Act cases in *Mandeville Island Farms, supra*.<sup>21</sup> To accomplish such a result, Summit would "return to a jurisdictional analysis under the Sherman Act of an era long past." *McLain*, at p. 244.

This Court can resolve the particular dispute herein merely by affirming that Dr. Pinhas can meet the test imposed on him by the Ninth Circuit. But the cases cited in footnote 20 demonstrate a compelling need for guidance to the lower courts. A strong statement by this Court affirming the equal reach of the Sherman Act and Congressional power under the Commerce Clause would prevent such injustices in the future.

DATED: September 18, 1990

LAWRENCE SILVER  
A Law Corporation  
LAWRENCE SILVER  
MARK E. FIELD

By: \_\_\_\_\_  
Lawrence Silver

BLECHER & COLLINS  
MAXWELL M. BLECHER  
ALICIA G. ROSENBERG  
*Attorneys for Respondent  
Simon J. Pinhas, M.D.*

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<sup>21</sup>Comment, *A Case Of Judicial Backsliding: Artificial Restraints On The Commerce Power Reach Of The Sherman Act*, 1985 Ill. L.Rev. 163, 176.

## **APPENDIX A**



## NOTE TO APPENDIX A

Dr. Pinhas needs to explain one aspect of this appendix which is irrelevant to the issues raised before this Court. Cedars-Sinai Hospital denied Dr. Pinhas privileges solely because it received a report from Midway "involving a suspension, loss or modification of Medical Staff privileges at Midway Hospital for reasons which included, without being limited to, *failure by you to do histories, physicals and workups.*" Emphasis added. Cedars did indeed receive a report which suggested such reasons for Midway's action against Dr. Pinhas. However, the Midway Judicial Review Committee specifically found that the charges of failure to do "histories, physicals and workups" were *not* sustained by the evidence. Joint Appendix, pp. 174-179.

[CEDARS-SINAI MEDICAL LETTERHEAD  
DELETED]

February 8, 1990

Simon J. Pinhas, M.D.

9033 Wilshire Boulevard

Suite #206

Beverly Hills, CA 90211

Dear Dr. Pinhas:

**RE: Notice of Denial of Medical Staff Membership  
Application and Notice of Charges**

This Notice of Denial and Charges is prepared pursuant to requirements set forth in the Constitution of the Medical Staff of Cedars-Sinai Medical Center (the "Constitution"). You are hereby informed that it has been recommended that you be denied Medical Staff membership.

Pursuant to Article III, Section 3(j) (i) of the Constitution, your application has been denied subject to: (a) the hearing and appeal rights set forth in Article XIII of the Constitution; (b) a positive decision from the hearing and/or appeal committee recommending approval of the application; (c) completion of the application process; and (d) ultimate approval of the application consistent with the Constitution and applicable Medical Staff Rules and Regulations.

The grounds for this action are based upon the following Medical Staff concerns:

a) Pursuant to review of your application, a material question exists with regard to your experience, current competence and good reputation not being documented with sufficient adequacy to assure the Cedars-Sinai Medical Staff and Board that any patient treated by you will receive the highest quality of medical care, (Constitution Article III, 1(b) and 3(j) (i); and

b) The evidence available pursuant to review of your application does not demonstrate that you have an acceptable interest, ability, and willingness to function effectively as a role model as required under Article III Section 1(e) of the Constitution.

The decision to take such action was made based upon the recommendation of the Surgical Advisory Committee and the Senior Vice President for Medical Affairs' reasonable effort to obtain the facts.

In reaching this decision, the following information was reviewed: Receipt by the Medical Staff of a Business and Professions Code 805 Report filed by Midway Hospital involving a suspension, loss or modification of Medical Staff privileges at Midway Hospital for reasons which included, without being limited to, failure by you to do histories, physicals and workups.

Consistent with the Constitution, you are hereby notified of your opportunity to have a Hearing Committee convened to review the action taken. Pursuant to Article XIII, Section 3 of the Constitution, you must request a hearing within thirty (30) days of receipt of this notice of charges. If you fail to request such a hearing in writing, sent to me by certified or registered mail, postage prepaid within thirty (30) days of your receipt of this notice, you will be deemed to have accepted the action involved. The action will become final upon the expiration of such thirty (30) day period.

In accordance with California Business and Professions Code Section 809.1, you are further hereby informed that if the above recommended action is adopted as "final" under the Constitution, the action shall be taken and reported pursuant to Business and Professions Code Section 805.



If you request to have a Hearing Committee convened, you will have the right to call, examine and cross-examine witnesses and to produce and to present written and oral evidence and may be represented by legal counsel of your choice. You may also be accompanied and represented at the Hearing by a physician or surgeon licensed to practice in the State of California and who, preferably, is a Medical Staff member in good standing at Cedars-Sinai Medical Center. You may also request to have a court reporter transcribe the hearing and to provide you with a copy of such transcript, at your cost. The hearing is informal in nature and not conducted according to the rules of law pertaining to the examination of witnesses or presentation of evidence. Any relevant evidence may be admitted regardless of the admissibility of such evidence in a court of law. Should you desire to obtain a list of witnesses to be called by the Medical Staff at the hearing, you should deliver a written notice to the undersigned of that desire.

A current copy of the Constitution is enclosed. If you have any questions regarding the contents of this letter or the hearing procedure, please contact me.

Sincerely,

James R. Klinenberg, M.D.  
Senior Vice President for  
Medical Affairs

cpe

cc: Michael L. Langberg, M.D.  
Peter Braveman, Esq.  
Barry Silbermann, Esq.

Enclosure

## **APPENDIX B**



b-1

89 22 4129

**FORM 10-K**

**SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

(Mark One)

☒ (X) ANNUAL REPORT PURSUANT TO SECTION 13  
OR 15(d) OF THE SECURITIES EXCHANGE  
ACT OF 1934 (FEE REQUIRED)

For the fiscal year ended June 30, 1989.

☐ ( ) TRANSITION REPORT PURSUANT TO SEC-  
TION 13 OR 15(d) OF THE SECURITIES EX-  
CHANGE ACT OF 1934

For the transition period from \_\_\_\_\_ to \_\_\_\_\_  
Commission file number 0-11479

**SUMMIT HEALTH LTD.**

(Exact name of Company as specified in its charter)

California 95-3154694  
(State or other jurisdiction (I.R.S. Employer  
of incorporation or organization) Identification No.)

2600 W. Magnolia Blvd., Burbank, CA 91505-3031  
(Address of principal executive offices) (Zip Code)

Company's telephone number, including area code:  
(818) 841-8750

Securities registered pursuant to Section 12(b) of the  
Act:

Title of each class

Name of each exchange  
on which registered

None

None

Securities registered pursuant to Section 12(g) of the Act:

Common Stock  
(Title of Class)

Indicate by check mark whether the Company (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Company was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days.

Yes ☒ No ☐

The aggregate market value of Common Stock held by non-affiliates\* as of September 18, 1989 was \$8,512,989.

#### DOCUMENTS INCORPORATED BY REFERENCE

Portions of the Company's and definitive proxy statement for its annual meeting of shareholders to be held on November 13, 1989, which will be filed with the Commission within 120 days of the Company's last fiscal year end, are incorporated by reference in Part III of this Form 10-K.

\* Without acknowledging that any individual director of the Company is an affiliate, the shares over which they have voting control have been included as owned by affiliates solely for purposes of this computation.

## PART I

### Item 1. Business

#### General

Summit Health Ltd. (which, together with its subsidiaries, is referred to as the "Company") is a health care company, which at June 30, 1989 operated 21 acute care hospitals, with a total of 2,977 licensed beds, and 17 nursing facilities, with a total of 2,230 licensed beds in California, Texas, Arizona, Iowa, Colorado, and in the Kingdom of Saudi Arabia. Subsequent to June 30, 1989, one hospital with 122 beds was closed. Eight of the acute care hospitals with a total of 1,229 licensed beds are located in the Kingdom of Saudi Arabia and are operated under three-year management agreements expiring in 1991. The Company also operates 16 medical office buildings for the staffs of its hospitals, four retirement hotels, two hemodialysis centers, one home health agency and four substance abuse centers. By providing a broad spectrum of integrated health care services to the communities it serves, the Company believes that it is competitively positioned to attract patients to its facilities.

As a result of Medicare and other cost containment legislation, it has become increasingly important to provide health care services in an efficient and cost effective manner. The Company believes that the integration of its hospitals with nursing and other health care facilities provides a more efficient health care delivery system than that provided by hospitals alone. The proximity of many of its hospitals to its nursing and other facilities makes a variety of health care services available to patients and encourages greater use of the Company's health care delivery system.



## Hospitals

The Company's hospitals provide health care services generally available in hospitals, including operating and recovery rooms, diagnostic radiology facilities, intensive care and coronary care facilities, pharmacies, clinical laboratories, rehabilitative therapy facilities, outpatient facilities and emergency departments. Certain of the hospitals offer specialized services, including open heart surgery, hemodialysis, obstetric departments and clinics specializing in treatment of industrial accidents. All of the Company's hospitals located in the United States are accredited by the Joint Commission on Accreditation of Healthcare Organizations and are certified for participation in the Medicare and Medicaid programs. In addition, some of the hospitals are also accredited by the American Osteopathic Association.

Each U.S. hospital is managed on a day-to-day basis by a full-time executive director employed by the Company. The medical and professional practice is governed by a medical executive committee of the medical staff under the authority of a board comprised primarily of staff physicians selected by their peers. The Company also has established a quality assurance committee at each hospital under the direction of a physician to review and to set standards for medical practices and nursing care and to assure compliance with regulatory standards. These committees develop quality assurance programs involving all departments, medical staffs, patients and services, and periodically monitor patient care, including admissions, discharges, length of stay and treatment. The Company has established utilization review committees which monitor patient care.

Hospital revenues depend primarily on occupancy rates, charges for room and board, the extent of and

charges for ancillary services provided to inpatients, and the extent of and charges for services provided to outpatients.

Occupancy rates are a function of admissions and length of patient stay and are affected by many factors, including the number of physicians using a hospital and the nature of their practices, the demographics of a hospital's service area, the characteristics of other hospitals in the same area and the degree of concern about health care costs. Management believes that nationwide downward trends in admissions and length of stay, which in turn affect occupancy rates, have resulted principally from government and private sector pressures to reduce inpatient hospitalization, such as the enactment of prospective payment reimbursement programs and the encouragement of preventive medicine and outpatient treatment. There can be no assurance as to future occupancy rates of the Company's hospitals.

The Company's domestic hospitals, currently in operation, have been experiencing declining occupancy levels and average lengths of hospital stays for the past few years. Declining occupancy levels and average length of hospital stay are national trends since the Federal Medicare program began to have reimbursement based upon Diagnosis Related Groups (DRG's). The growth of health maintenance organizations, increased use of non-hospital and outpatient surgical and diagnostic facilities, and use of home health care services, together with more stringent utilization review procedures have also contributed to the decline. The weighted average occupancy rate for these hospitals has declined from 45 percent for fiscal 1987 to 41 percent in 1988 and improved slightly to 42 percent for fiscal 1989.

10  
No. 89-1679

SUPREME COURT, U.S.

FILED

OCT 18 1990

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1990

SUMMIT HEALTH, LTD., ET AL.,

*Petitioners,*

vs.

SIMON J. PINHAS, M.D.,

*Respondent.*

On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit

PETITIONERS' REPLY BRIEF

J. MARK WAXMAN\*  
TAMI S. SMASON  
WEISSBURG AND ARONSON, INC.  
Attorneys at Law  
2049 Century Park East  
Suite 3200  
Los Angeles, California 90067  
(213) 277-2223  
*Counsel for Petitioners*

\*Counsel of Record



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## I. THE ALLEGATIONS OF THE FIRST AMENDED COMPLAINT ARE INSUFFICIENT TO INVOKE SHERMAN ACT JURISDICTION

The issue before the Court is the validity of the dismissal of a Sherman Act claim which, with respect to jurisdiction, alleges only that each of the parties is or has been engaged in interstate commerce. J.A. 2-6. Petitioner contends that jurisdiction under Section 1 of the Sherman Act exists only where an alleged conspiracy itself is "in restraint of trade or commerce among the several States" (15 U.S.C. § 1) or, as that provision of the Sherman Act has been interpreted in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976), *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and other cases, where the alleged conspiracy has been determined to have a substantial effect on interstate commerce as a matter of practical economics. See, e.g., *McLain*, 444 U.S. at 246. The First Amended Complaint fails to plead the requisites for Sherman Act jurisdiction under either the plain language of the statute or its interpretation by the Court.

Respondent argues that Sherman Act jurisdiction should be invoked because "the peer review process in general indisputably affects interstate commerce." Respondent's Brief at 27.<sup>1</sup> To support this argument,

<sup>1</sup> The complaint fails to identify a relevant market allegedly affected by the defendants' alleged conspiracy, but both respondent and the Ninth Circuit have focused on peer review as the activity in question. The United States, in its brief amicus curiae, appears to argue that the relevant

(Continued on following page)



however, respondent does not cite a single allegation of the First Amended Complaint, as there is no allegation that peer review has any effect on interstate commerce. Moreover, such a broad factual assertion would be incorrect. As amici curiae hospital associations explain, peer review activities may or may not substantially affect interstate commerce, depending on the type of peer review activity and the facts of each case. Hospital Association Brief at 9-10. Similarly, as Clark C. Havighurst, co-author of the amicus brief of Richard A. Bolt, M.D., supporting respondent, has recognized: "it may easily be doubted that the exclusion of a single applicant from the staff of a single hospital has any significant bearing upon either interstate trade or consumer welfare, the focus of federal antitrust law." C. HAVIGHURST, HEALTH CARE LAW AND POLICY, at 674 (1988).

The allegations of the First Amended Complaint fail to support the Ninth Circuit's holding that Sherman Act jurisdiction exists in this case because peer review affects interstate commerce. The complaint itself contains no such allegations, and an understanding of the nature of peer review activity and Professor Havighurst's observation compel the opposite conclusion. The Ninth Circuit's ruling was erroneous, and should be reversed.

---

(Continued from previous page)

market is either "hospital ophthalmological services in general or those of this hospital" (U.S. Brief at 17 n.9), but such a contention is not properly before this Court. Neither of these potential markets is alleged in the complaint. The issue before this Court, therefore, is solely whether allegations that the parties generally are engaged in interstate commerce are sufficient to invoke Sherman Act jurisdiction.

## II. THE PROPOSED "CLASS OF ACTIVITIES" AND "LINE OF COMMERCE" TESTS ARE INCONSISTENT WITH SECTION 1 OF THE SHERMAN ACT AND CASE LAW DETERMINING ITS JURISDICTIONAL SCOPE

The United States proposes tests for finding Sherman Act jurisdiction which are described as "a class of economic activities" test (U.S. Brief at 12) and a "line of business" test (U.S. Brief at 14), but the United States does not define either test or provide guidance as to how either would be applied to the allegations of a particular complaint. The First Amended Complaint in this case contains no allegations of a class of economic activities or line of commerce affected by the alleged conspiracy which affects interstate commerce. It does not, as the United States argues, identify "ophthalmological services" as such a class of activities. U.S. Brief at 6. Nor does the allegation that Summit Health, Midway Hospital's parent corporation, owns hospitals in other states (J.A. 3), logically imply that ophthalmological services affect interstate commerce, as the United States asserts. U.S. Brief at 6. There are no allegations that the ophthalmological services at Midway affect ophthalmological services, or any other services, at any other hospital owned by Summit. Thus, the United States applies the proposed tests to the allegations of the complaint before this Court by first reaching its conclusion that interstate commerce is substantially affected, and then speculating as to facts and a potential class of economic activities which respondent may be able to allege (but did not). The tests do not provide any guidance, but are instead used as devices to eliminate any jurisdictional requisites.

The tests proposed by the government would also ignore the statutory language of Section 1 and its interpretation by this Court in numerous prior decisions. In *McLain*, *Hospital Building Co.*, *Goldfarb* and the precedents upon which those cases are based, the Court has interpreted the Section 1 prohibition against conspiracies "in restraint of trade or commerce among the several States . . ." by focusing on the alleged restraint itself and its effects or potential effects on interstate commerce, based on the record (which in this case is limited to the allegations of the First Amended Complaint), to determine whether Sherman Act jurisdiction exists.<sup>2</sup> Under the United States' proposed tests, in *Goldfarb* it would have been unnecessary for the Court to examine the relationship between examinations of land titles and out-of-state financing to conclude that price-fixing by attorneys conducting title examinations would substantially affect interstate commerce. Instead, legal services in general

<sup>2</sup> In *McLain*, for example, the Court conducted a detailed review of the evidentiary record, including the dollar amounts and types of interstate commerce potentially affected by the alleged price-fixing conspiracy. *McLain*, 444 U.S. at 237-239. In *Hospital Building Co.*, the Court analyzed the specific allegations of the effect of blocking the hospital's expansion on various enumerated aspects of interstate commerce, such as management fees paid to an out-of-state corporation and multimillion-dollar financing from out of state. 425 U.S. at 744. In *Goldfarb*, the Court reviewed the nature of the alleged price-fixing conspiracy (421 U.S. at 775-779) and the relationship between examinations of land title and out-of-state financing, including the district court's findings of fact that a title examination is a prerequisite to financing, and that a "significant" portion of the financing for Fairfax County homes comes from out of state (421 U.S. at 783-785).

would be viewed as a "line of business" which, in the aggregate, clearly affects interstate commerce. The entire factual and practical economic analysis undertaken by the Court in *Goldfarb* would have been superfluous. Moreover, the Court would have been incorrect in stating "[o]f course, . . . there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman act." *Goldfarb*, 421 U.S. at 785-786. Under the United States' view, legal services would be considered a "class" of activities, without regard to the facts of a particular case, to determine whether Sherman Act jurisdiction applies.

In *Hospital Building Co.*, under the United States' proposed tests, the Court's analysis of the potential effects on interstate commerce of an alleged attempt to block a hospital's expansion was superfluous, and the Court's statement that Sherman Act jurisdiction applies "[a]s long as the restraint in question substantially and adversely affects interstate commerce" (425 U.S. at 743) was dictum. The fact that a hospital's "line of business," or the "class of activities" consisting of provision of health care services generally, affects interstate commerce, would have been sufficient to apply Sherman Act jurisdiction.

In none of these cases would the Court have been required to discuss, let alone analyze, the interstate commerce implications of the alleged restraint. All that would have been required would have been identification of a "line of business," as broad as necessary, which was in some way involved in the underlying case. Because every line of business, considered in the aggregate, or as part of some other "class of activities," (U.S. Brief at 14) affects



interstate commerce, it is difficult to envision any commercial activity, no matter how local, which would be outside the reach of the Sherman Act under the proposed tests.

For example, employees claiming wrongful termination could file Sherman Act claims on the theory that the employer's line of business affects interstate commerce (*but see Daley v. St. Agnes Hospital*, 490 F.Supp. 1309 (E.D. Pa. 1980) (no Sherman Act jurisdiction in claim against hospitals for conspiring to terminate nurse)), and street vendors could claim that their line of business is in a class of activities affecting interstate tourism in order to bring their local grievances within the Sherman Act (*but see Huelsman v. Civic Center Corp.*, 873 F.2d 1171 (8th Cir. 1989) (unemployed street vendors' claims not within Sherman Act jurisdiction)). No grievance, no matter how small or how local, would fall outside the jurisdictional boundaries of the Sherman Act under the United States' proposed tests.

The fallacy of the United States' argument is that it fails to distinguish between classes of activities which Congress can regulate pursuant to the Commerce Clause and the enforcement of laws in a particular case. This Court has recognized that "the jurisdictional inquiry under . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 197 n.12 (1974) (citations omitted).

The recognition that the Congressional definition of activities which affect interstate commerce for the purpose of regulation is different from the definition for the purpose of enforcement is not unique to jurisdictional determinations under the antitrust laws. The Seventh Circuit, *en banc*, has noted that a statute which applies to a class of activities which affects interstate commerce (in that case, the statute at issue was the Hobbs Act, 18 U.S.C. § 1951), does not allow a court to conclude that "Congress intended any activity within the class to be subject to prosecution without the necessity of any showing of an actual or potential effect on commerce in the particular case." *United States v. Staszczuk*, 517 F.2d 53, 59 n.16 (7th Cir.) (Stevens, J.), *cert. denied*, 423 U.S. 837 (1975).

The United States argues that requiring that the allegedly anticompetitive conduct affect interstate commerce "would unjustifiably impair antitrust enforcement efforts" (U.S. Brief at 14), but has failed to cite a single case or situation in which antitrust enforcement efforts have been impaired under the existing Sherman Act jurisdictional standards, and therefore cannot justify expansion of Sherman Act jurisdiction in the manner it suggests.<sup>3</sup>

<sup>3</sup> Similarly, the states which filed an amicus brief supporting respondent argue that without expansion of Sherman Act jurisdiction to purely local activities, "certain violations essentially local in nature might be left unredressed" because of alleged gaps in state laws, such as those affecting unilateral monopolization (States' Brief at 9-10). States are free, however, to prohibit local anticompetitive conduct they wish to prohibit.

(Continued on following page)

### III. UNDER ANY TEST, THE HOLDING OF THE NINTH CIRCUIT IN THIS CASE MUST BE REVERSED

The briefs in this case suggest several tests for finding Sherman Act jurisdiction: (1) petitioners contend that the statutory language of Section 1, as interpreted by *McLain* and other precedents, requires that the allegedly anticompetitive conduct substantially affect interstate commerce; (2) respondent argues that the Ninth Circuit properly applied the "infected activity" test, concluding that peer review is the infected activity and that it "indisputably" affects interstate commerce (Respondent's Brief at 11, 27); and (3) the United States proposes that courts examine the relationship between interstate commerce and either a class of economic activities or a line of business out of which the alleged anticompetitive activity arises, such that Sherman Act jurisdiction for private enforcement purposes would be identical to Congress' power to regulate commerce under the Commerce Clause. Under each test, the Ninth Circuit holding must be reversed.

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(Continued from previous page)

Moreover, many of the states which are alleged to have gaps in their antitrust laws have unfair competition laws which could be applied to the conduct in question. *See, e.g.*, MONT. CODE ANN. § 30-14-205 (1989) (prohibiting a person from, *inter alia*, creating a monopoly); N.C. GEN. STAT. § 75-1.1 (1988) (prohibiting unfair methods of competition); OKLA. STAT. ANN. tit. 79, § 1 (West 1987) (prohibiting "every act" in restraint of trade or commerce); S.C. CODE § 39-5-20 (1985) (prohibiting unfair methods of competition).

The first Amended Complaint does not allege that interstate commerce was or would have been affected by the exclusion of Dr. Pinhas from Midway's medical staff, as would be required under the standard urged by petitioners. It also fails to allege that peer review affects interstate commerce, as would be required by respondent's proposed test. The Ninth Circuit's finding that peer review does affect interstate commerce is unsupported by the record and, as discussed in the Hospital Association brief, is incorrect. Hospital Association Brief at 9-10. Finally, the First Amended Complaint does not identify any class of economic activities which would give rise to Sherman Act jurisdiction in this case under the test proposed by the United States. The provision of hospital services is not affected, and is not alleged to be affected, in a not insubstantial manner by the peer review decision rendered against Dr. Pinhas nor by peer review proceedings in general conducted at Midway. Thus, the allegations of the First Amended Complaint are insufficient to satisfy any of the proposed tests, and the Ninth Circuit's holding must be reversed.

### IV. CONCLUSION

Section 1 of the Sherman Act prohibits only those contracts, combinations and conspiracies "in restraint of trade or commerce among the several states. . . ." While the statute has been construed to prohibit conspiracies which do not directly restrain interstate commerce, but nevertheless substantially affect interstate commerce, respondent and the United States argue that the alleged conspiracy need not have any effect, direct or indirect, substantial or otherwise, on interstate commerce. This is



contrary to the plain language of the statute and nearly a century of judicial interpretation of that statute. However, even under the tests proposed by respondent and the United States, the First Amended Complaint fails to plead the requisites for Sherman Act jurisdiction.

Under any analysis, the Ninth Circuit holding that the allegations of the First Amended Complaint are sufficient to invoke Sherman Act jurisdiction must be reversed, and the district court dismissal of the First Amended Complaint should be affirmed.

Respectfully submitted this 18th  
day of October, 1990

J. MARK WAXMAN  
TAMI S. SMASON  
WEISSBURG AND ARONSON, INC.  
Attorneys at Law  
2049 Century Park East  
Suite 3200  
Los Angeles, California 90067  
(213) 277-2223  
*Counsel for Petitioners*

No. 88-1079

Supreme Court, U.S.

FILED

SEP 18 1990

ROBERT L. SPANGL, JR.  
CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1990**

**SUMMIT HEALTH, LTD., ET AL., PETITIONERS**

**V.**

**SIMON J. PINHAS**

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING RESPONDENT**

**KENNETH W. STARR**  
*Solicitor General*

**JAMES F. RILL**  
*Assistant Attorney General*

**LAWRENCE G. WALLACE**  
*Deputy Solicitor General*

**MICHAEL BOUDIN**  
*Deputy Assistant Attorney General*

**LAWRENCE S. ROBBINS**  
*Assistant to the Solicitor General*

**ROBERT B. NICHOLSON**  
**MARION L. JETTON**  
*Attorneys*

**JAMES M. SPEARS**  
*General Counsel*  
*Federal Trade Commission*  
*Washington, D.C. 20580*

*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

**BEST AVAILABLE COPY**



### **QUESTION PRESENTED**

Whether in this antitrust case respondent has shown a sufficient nexus with interstate commerce to withstand a motion to dismiss on the pleadings.

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## In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1679

SUMMIT HEALTH, LTD., ET AL., PETITIONERS

v.

SIMON J. PINHAS

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING RESPONDENT

## INTEREST OF THE UNITED STATES

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1 and 2. The question presented by this case—concerning the scope of the “commerce” requirement under the Sherman Act—directly affects that enforcement responsibility, since as a plaintiff in civil and criminal cases, the government is required to show that an activity is “in commerce” or affects commerce. Moreover, because the federal government regulates many aspects of the health care industry and disburses substantial funds to participants in that industry, anticompetitive activity in the health-care sector of the



economy could significantly affect existing federal programs.

#### STATEMENT

1. Respondent Simon J. Pinhas, M.D., is an eye physician and ophthalmological surgeon. Compl. ¶ 5; Pet. App. A5, A37.<sup>1</sup> In October 1981, he became a member of the medical staff at petitioner Midway Hospital Medical Center (Midway) in Los Angeles, California, and thereafter performed more ophthalmological operations than any of his colleagues. Compl. ¶¶ 5, 22; Pet. App. A5, A42. At that time, Midway required the use of assistant surgeons during eye surgery. In February 1986, however, Medicare elected to stop reimbursing physicians for the services of assistants. Respondent and several other surgeons at Midway asked the hospital to eliminate the required use of assistants; respondent explained that, in his own case, eliminating the requirement would save him as much as \$60,000 per year. Compl. ¶¶ 22-26; Pet. App. A5-A6, A42-A43.

Midway declined to revoke the requirement. Instead, the hospital offered respondent what he regarded as a "sham" contract. Under it, respondent would be paid \$60,000 per year for consulting services that he would not be expected to perform. Respondent rejected the proposal. Compl. ¶¶ 27-28; Pet. App. A6, A44.

Allegedly unhappy with respondent's refusal to accept the contract, petitioners thereafter initiated peer review proceedings against him. Compl. ¶ 29; Pet. App. A6, A45. On April 13, 1987, Midway summarily suspended

<sup>1</sup> Because this case comes to the Court from the granting of a motion to dismiss on the pleadings, the facts alleged in the complaint must be taken as true. We accordingly describe pertinent allegations of the complaint in some detail.

respondent. Compl. ¶ 29; Pet. App. A6-A7, A45.<sup>2</sup> One week later, the Midway Executive Committee met and, after permitting respondent to make a statement, upheld the suspension and recommended that respondent's staff privileges at Midway be terminated. Compl. ¶¶ 31-32; Pet. App. A7, A45-A46. Thereafter, the Midway Judicial Review Committee conducted hearings and issued a report, upholding only one of the seven charges against respondent and recommending probationary reinstatement with special conditions. Compl. ¶ 74; Pet. App. A7, A56. On further appeal, the Governing Board of the hospital in February 1988 affirmed the Committee's decision, but imposed more stringent conditions on his practice. Pet. App. A7. On May 17, 1989, the Superior Court of the State of California denied respondent's request for further relief. *Id.* at A8, A30-A35.

2. In July 1987, while the administrative proceedings were still pending, respondent brought the present action in the United States District Court for the Central District of California, claiming, among other things, that petitioners had conspired to violate Section 1 of the Sherman Act, 15 U.S.C. 1. See Compl. ¶¶ 120-126; Pet. App. A74-A76. In support of that claim, respondent alleged that he was "engaged in the practice of medicine and surgery \* \* \* and as such [was] engaged in interstate commerce." Compl. ¶ 5; Pet. App. A37. He made similar claims about petitioners, including Midway, the Midway medical staff, and Summit Health Ltd., Midway's parent corporation—which, respondent alleged, "owns and operates approximately 19 hospitals and 49 nursing home facilities in California, Arizona, Colorado, Oregon, Iowa,

<sup>2</sup> In its letter of suspension, the hospital stated that a medical staff review had raised questions about various aspects of respondent's practice, including the appropriateness of his surgical procedures. Compl. ¶ 29; Pet. App. A6-A7, A45.

Washington, Texas and Saudi Arabia." Compl. ¶¶ 6-19; Pet. App. A37-A41. Respondent alleged that by instituting an unwarranted peer review proceeding against him, petitioners had effected an unlawful boycott, intended to drive him out of business and provide petitioners with a larger share of the eye care and ophthalmic surgery market in Los Angeles. Compl. ¶¶ 122-123; Pet. App. A74. Respondent further claimed that petitioners had prepared certain adverse reports concerning the review proceedings; once disseminated, he alleged, those reports would preclude respondent from practicing medicine in California, "if not the United States." Compl. ¶ 124; Pet. App. A74-A75.

3. On October 2, 1987, the district court granted petitioners' motion to dismiss the complaint. See Pet. App. A28-A29. With respect to the Sherman Act claim, the court found that respondent's allegations were barred by the state action doctrine. *Id.* at A9. The court did not reach the question whether respondent had alleged a sufficient nexus to interstate commerce.

The court of appeals affirmed in part and reversed in part. Pet. App. A1-A27. After rejecting petitioners' state action defense (*id.* at A16), the court proceeded to find a sufficient nexus with interstate commerce to sustain the Sherman Act cause of action. The court explained that, under the Sherman Act, respondent was required to "identify a relevant aspect of interstate commerce and then show 'as a matter of practical economics' that the Hospital's activities have a 'not insubstantial effect on the interstate commerce involved.'" *Id.* at A19. The court concluded that respondent had made such a showing. In particular, the court stated, petitioners' peer-review proceedings had an "effect on interstate commerce \* \* \* that can hardly be disputed," in that they "affect the entire staff at Midway and thus affect the hospital's interstate

commerce." *Id.* at A20. Relying on *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980), the court rejected petitioners' contention that respondent was required to "make the more particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from working." Pet. App. A19-A20.

#### SUMMARY OF ARGUMENT

A. To state a claim under the Sherman Act, a plaintiff need not allege a nexus between interstate commerce and the challenged anticompetitive conduct itself. This Court's decision in *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), expressly rejected any such requirement, and petitioners' contrary contention cannot be squared with the plain terms of that case. What is more, petitioners' narrow conception of the commerce requirement would unjustifiably burden antitrust litigation, thereby impairing the proper and effective enforcement of the antitrust laws.

Instead, it is sufficient for a plaintiff to show that the line of business at issue, if not the challenged conduct itself, affects commerce. Still more broadly, we believe that, in an appropriate case, a plaintiff may sustain a Sherman Act claim where the class of economic activities that includes the line of business at issue affects interstate commerce. This broader view is rooted in the Court's Commerce Clause decisions, as well as the Court's related recognition that "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'" *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945).

B. Under an appropriate construction of the commerce requirement—either the "class of activities" approach or the "line of business" approach—respondent's showing was sufficient to withstand a motion to dismiss.



Respondent identified a class of activities—the provision of ophthalmological services—out of which the challenged boycott arose. That class of activities, the complaint asserted, affects interstate commerce in several respects: physicians and hospitals receive reimbursement through federal Medicare payments (Pet. App. A43); individual hospitals are often constituents of larger, interstate operations (*id.* at A37); and reports concerning peer review proceedings are routinely distributed across state lines, thereby affecting the availability of employment opportunities on a nationwide basis (*id.* at A74-A75). Moreover, in their brief in the court of appeals, petitioners appear to have acknowledged that their line of business receives a certain number of out-of-state patients, as well as out-of-state revenues. C.A. Br. 25. See also Pet. App. A19 n.6. On that record, the court of appeals correctly concluded that respondent had shown a sufficient nexus with interstate commerce to withstand the motion to dismiss.

#### ARGUMENT

##### RESPONDENT HAS ESTABLISHED A SUFFICIENT NEXUS WITH INTERSTATE COMMERCE UNDER THE SHERMAN ACT TO WITHSTAND A MOTION TO DISMISS

###### A. Under The Sherman Act, A Plaintiff Need Not Allege A Nexus Between Interstate Commerce And The Challenged Anticompetitive Conduct Itself

1. The Court's decisions have long "permitted the reach of the Sherman Act to expand along with expanding notions of congressional power." *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976). For example, the Court has held that the Act applies not only to activities that are themselves in interstate commerce, but also "to local activities which, although not themselves within the flow of interstate commerce, substantially affect interstate commerce." *United States v. American*

*Bldg. Maintenance Indus.*, 422 U.S. 271, 278 (1975). Accord *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234 (1948).

On that basis, the Sherman Act reaches liquor wholesalers in Oklahoma who divide markets by territories and brands, and thereby reduce competition, increase prices, and affect interstate sales. *Burke v. Ford*, 389 U.S. 320, 322 (1967). The Act extends as well to the intrastate fixing of attorneys' fees, because attorneys' services are related to the procuring of mortgage loans, and many mortgage loans are procured through interstate commerce. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783-785 (1975). And the Act extends to attempts to monopolize intrastate provision of hospital services, because hospitals buy drugs and receive insurance payments through the channels of interstate commerce. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976).

Under that broad view of the Sherman Act, the Court has rejected the proposition—urged by petitioners in this case (Pet. 3)—that plaintiffs must show a nexus between interstate commerce and the challenged anticompetitive activity in particular. The Court's decision in *McLain v. Real Estate Bd. of New Orleans, Inc.*, *supra*, makes that point clearly. The petitioners in *McLain* brought an anti-trust action against several New Orleans real estate brokers, claiming that the brokers had conspired to fix brokerage fees on the sales of residential houses. The brokers moved to dismiss the complaint on the ground that there was not a sufficient nexus with interstate commerce. Rejecting that contention, the Court held that it was sufficient to allege that the defendants' general brokerage activity affected interstate commerce, even if



the challenged conspiracy itself was entirely intrastate. As the Court put the matter (444 U.S. at 242-243):

To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful.

Applying that principle, the Court concluded that the plaintiffs had alleged a sufficient nexus to interstate commerce to withstand a motion to dismiss. The Court focused not on the challenged conspiracy, or even on the setting of brokerage fees in general, but rather on the still more general "function of . . . real estate brokers"—"to bring the buyer and seller together on agreeable terms." *Id.* at 246. "Brokerage activities," the Court explained, "necessarily affect both the frequency and the terms of residential sales transactions"; and "whatever stimulates or retards the volume of residential sales . . . affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce." *Ibid.* Rejecting the motion to dismiss, the Court held that "petitioners at trial may be able to show that respondents' activities have a not insubstantial effect on interstate commerce." *Ibid.*

2. While two circuits have recognized the broad sweep of the *McLain* case,<sup>1</sup> most courts of appeals have read the

<sup>1</sup> See, e.g., *Western Waste Serv. Sys. v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.) (Kennedy, J.) (in light of *McLain*, it is sufficient that the "defendant's business activities, independent of the violations, affected interstate commerce"), cert. denied, 449 U.S. 869

case more narrowly. The Tenth Circuit's decision in *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (1980), illustrates the latter view. The court held in *Crane* that the Sherman Act requires plaintiffs to show a "nexus . . . between interstate commerce and the challenged activity." *Id.* at 724. The court acknowledged that *McLain* had specifically relieved plaintiffs of having to make "the more particularized showing of an effect on interstate commerce caused by the conspiracy." *Id.* at 723 (quoting *McLain*, 444 U.S. at 242). In the Tenth Circuit's view, however, that language meant only that "an elaborate analysis of interstate impact is not necessary at the jurisdictional stage," but rather merely "an allegation showing a logical connection as a matter of practical economics between the unlawful conduct and interstate commerce." 637 F.2d at 723. The Tenth Circuit also recognized that the Court in *McLain* had focused on "respondents' brokerage activities" in assessing the nexus with interstate commerce (*ibid.* (quoting *McLain*, 444 U.S. at 242)); but the court of appeals read that language to refer only "to the challenged activities, not the brokers' overall business" (637 F.2d at 723). Several other circuits, adopting the same rationale as *Crane*, have taken an equally narrow view of the *McLain* case. See, e.g., *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 613-614 (6th Cir. 1986) (opinion of Krupansky, J.); *id.* at 617-618 (Holschuh, J., concurring in the judgment); *Hayden v. Bracy*, 744 F.2d 1338, 1343 n.2 (8th Cir. 1984); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 925-926 (2d Cir. 1983); *Cordova & Simonpietri Ins.*

(1980); *Shahawy v. Harrison*, 778 F.2d 636, 640 (11th Cir. 1985) (rejecting the Tenth Circuit's narrower holding in *Crane v. Intermountain Health Care, Inc.*, 737 F.2d 715 (1980), see page 9, *infra*, and stating that "in this circuit Sherman Act jurisdiction requires a focus on the interstate markets involved in the defendant's business activities").

*Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 44-45 (1st Cir. 1981). See also *Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985).

We believe that those decisions reflect "a strained reading of the *McLain* opinion." *Stone v. William Beaumont Hosp.*, 782 F.2d at 622 (Martin, J., concurring in the judgment). *McLain* stated, in unmistakable terms, that a Sherman Act plaintiff "need not make the more particularized showing" of a nexus between the challenged activities and interstate commerce (see pages 7-8, *supra*); instead, the plaintiff need allege no more than a nexus between commerce and the line of business at issue. 444 U.S. at 242. The Court therefore looked to the brokers' overall business, concluding that their brokerage activities in general—and therefore the alleged anticompetitive commissions—fell within the ambit of the Sherman Act.

Judge (now Justice) Kennedy properly applied that "line of business" approach in his opinion for the Ninth Circuit in *Western Waste Serv. Sys. v. Universal Waste Control*, 616 F.2d 1094 (1980). The plaintiff in that case, a company engaged in the waste disposal business, sued another waste disposal firm for alleged antitrust violations. The court of appeals sustained the Sherman Act claim, holding that the plaintiff had sufficiently shown an effect on interstate commerce. Under *McLain*, the court explained, it was not necessary to show that the defendant's "alleged antitrust violations had a substantial effect on interstate commerce." *Id.* at 1096. Rather, the court noted, the plaintiff could go forward if it showed that the defendant's "rubbish collection business" substantially affected interstate commerce. *Id.* at 1097. The court of appeals held that that broader standard was met, particularly in light of the defendant's substantial purchases of out-of-state equipment. *Id.* at 1098.

3. Although we agree with the view of the Ninth Circuit—that the affected line of business may provide the nexus with interstate commerce—we also believe that, in an appropriate case, a plaintiff may base a claim on a still broader theory of the scope of the Sherman Act. On that view, the commerce requirement may be satisfied where a plaintiff shows that the generic class of economic activities that includes the line of business at issue is in or affects interstate commerce. That broader view is firmly rooted in this Court's decisions interpreting and applying Congress's power under the Commerce Clause.

With limited exceptions,<sup>4</sup> the Sherman Act applies to all activities within Congress's power under the Commerce Clause. "Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932). As the Court has explained, "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements." *United States v. Southeastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944). Ac-

<sup>4</sup> Congress has carved out some statutory exceptions from the reach of the Sherman Act. See, e.g., Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b) (1982) (exception for state laws regulating the insurance business); 49 U.S.C. 11341(a) (1982) (exempting from the antitrust laws any carrier, corporation, or other person who participates in a consolidation approved by the Interstate Commerce Commission); Norris-La Guardia Act, 29 U.S.C. 101 *et seq.* (1982) (labor injunctions); Capper-Volstead Act, 7 U.S.C. 291-292 (1982) (agricultural cooperatives). In addition, this Court has adopted certain limiting constructions on the reach of the Sherman Act. See, e.g., *Parker v. Brown*, 317 U.S. 341 (1943) (state action limitation); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (limitation for methods of petitioning the government for legislative change).



cordingly, "Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'" *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945). See also *United States v. American Bldg. Maintenance Indus.*, 422 U.S. at 278; *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-195 (1974); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940).

The power Congress possesses under the Commerce Clause is extensive. It reaches the farmer who grows wheat and bakes his own bread, because even this wholly intrastate activity can affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942). It reaches regulation of the price of intrastate milk sales, because those sales affect the price of interstate sales. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942). It reaches the local employment practices of employers whose goods later are shipped interstate. *United States v. Darby*, 312 U.S. 100 (1941). And it reaches the service of small family-owned restaurants and motels, because they may obtain food from out of state or serve interstate travelers. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). See also *Hodel v. Indiana*, 452 U.S. 314, 324 (1981) (commerce power allows Congress to protect "prime farmland" from damage); *Scarborough v. United States*, 431 U.S. 563 (1977) (commerce power allows Congress to forbid felons to possess guns that have ever traveled interstate); *United States v. Sullivan*, 332 U.S. 689 (1948) (commerce power allows Congress to prohibit relabeling of drugs after interstate shipment).

What is more, once a class of economic activities is found to affect commerce, Congress can regulate all of the activities of that class, even activities that do not separately affect commerce. The Court's decision in *Perez v.*

*United States*, 402 U.S. 146 (1971), explicitly illustrates the point. The petitioner in that case challenged his loansharking conviction, contending that the two extortionate loans he had made—for \$1000 and \$2000, respectively—did not affect interstate commerce, and therefore could not constitutionally be proscribed by Congress. This Court rejected that claim. "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Id.* at 154. Thus, the Court explained, even if there is no "proof that the particular intrastate activity against which a sanction was laid had an effect on commerce," the sanction is nonetheless permissible if the intrastate activity falls within "*a class of activities* \* \* \* properly regulated by Congress." *Id.* at 152. Applying that principle, the Court upheld petitioner's loansharking conviction. The Court noted that, however local the particular transactions might have been, they fell within the *class* of loansharking activity, and loansharking in the aggregate exerted a substantial impact on interstate business. *Id.* at 149-150, 154-157.

The Court unanimously applied the same "class of activities" test in *Russell v. United States*, 471 U.S. 858 (1985). The petitioner in that case was convicted, under 18 U.S.C. 844(i), for attempting to set fire to a two-unit apartment building that he had been using as rental property. Petitioner challenged his conviction, contending that the apartment building did not "affect[ ] interstate or foreign commerce" within the meaning of Section 844(i). 471 U.S. at 859. In rejecting that claim, the Court noted that the language of Section 844(i) "expresse[d] an intent by Congress to exercise its full power under the Commerce Clause" (471 U.S. at 859).<sup>3</sup> Moreover, the Court added,

<sup>3</sup> The Sherman Act, of course, uses language that is no less broad and, as we have recounted, has been similarly construed by this Court.



"[t]he congressional power to regulate the class of activities that constitute the rental market for real estate includes the power to regulate individual activity within that class" (*id.* at 862). Because "the local rental of an apartment unit is merely an element of a much broader commercial market in rental properties" (*ibid.*)—a market that Congress unquestionably had the power to regulate—the Court held that Congress likewise had the power to regulate activities with respect to an individual building. This Court in *Russell* thus explicitly applied the "class of activities" test to basically the same industry involved in *McLain*.

Because Congress' commerce power reaches any activity within a class of conduct that affects commerce, the Sherman Act likewise extends to any anticompetitive behavior within a class of commercial activity that affects interstate commerce. Under that view, even if the affected line of business is local, a plaintiff may nonetheless assert a Sherman Act claim if the class of activities within which the line of business falls affects commerce.<sup>6</sup>

4. An unduly narrow construction of the commerce requirement—one that requires a nexus between commerce and the challenged anticompetitive behavior—would unjustifiably impair antitrust enforcement efforts. There are substantial realms of antitrust enforcement where the line of business (or class of commercial activity) at issue manifestly affects interstate commerce, but the effect of individual transactions on interstate commerce, such as a particular rigged bid or price-fixed sale, can be traced only by arduous reconstruction and fine-grained

<sup>6</sup> See generally Mann, *The Affecting Commerce Test: The Aftermath of McLain*, 24 Hous. L. Rev. 849 (1987); Note, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U. Pa. L. Rev. 121, 133-134 (1983).

analysis. Indeed, the reported cases show that certain conspiracies (such as rigged bids on school milk sales, rigged auction rings, rigged bids on local road building contracts, and rigged bids in small-scale military procurement) are a major and recurring concern precisely because, although the individual transactions are not large, the cumulative impact of such anticompetitive transactions in the industry can represent tens or hundreds of millions of dollars in losses for the public.

The government's investigation of the Florida milk market is one such example. To date, the United States has filed 18 cases, involving six companies and 13 individuals. It has collected \$8,520,000 in fines, \$3,785,150 in damages, and has secured terms of imprisonment for ten of the convicted participants.<sup>7</sup> Although price fixing in the milk market has, in the aggregate, significant interstate implications, cf. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942), the individual transactions typically involve local buyers and local sellers. The same holds true for aspects of the health-care industry. Here, too, the government has mounted aggressive efforts to curb such anticompetitive activities as collusive bidding, boycotts of individual practitioners and HMOs, and anticompetitive hospital mergers. See *Health Care Trends—U.S. Official's*

<sup>7</sup> See, e.g., *United States v. Pippin*, No. TCR:89-04032 (N.D. Fla. Sept. 10, 1990); *United States v. Clark*, No. 90-41CRT10C (M.D. Fla. Feb. 9, 1990); *United States v. Mistler*, No. 89-219-CR-T-10B (M.D. Fla. Sept. 18, 1989); *United States v. Hallberg*, No. 89-130-13(A) (M.D. Fla. June 29, 1989); *United States v. Jackson*, No. 89-72CRT-13A (M.D. Fla. Apr. 18, 1989); *United States v. Tribble*, No. 89-21CRT(15)(C) (M.D. Fla. Feb. 22, 1989); *United States v. Garrett*, No. 88-385-CRT-13B (M.D. Fla. Dec. 22, 1988); *United States v. Tanna*, No. 88-203-CRJ16 (M.D. Fla. Nov. 21, 1988); *United States v. Howard*, No. 88-363-CRT17(C) (M.D. Fla. Nov. 15, 1988); *United States v. Hall & JTH Investment Co.*, No. 88-348CRT-10C (M.D. Fla. Oct. 26, 1988).

*Views*, 77 Trade Reg. Rep. (CCH) ¶ 50,025, at 48,601-48,607 (Nov. 14, 1989) (remarks of Robert E. Bloch).<sup>8</sup>

The precedents of this Court clearly establish commerce clause jurisdiction where the violation infects an activity or business that affects interstate commerce, or is part of a class of such activities or businesses that taken as a whole affect interstate commerce. In these circumstances, it is a pointless, expensive, and distracting expansion of litigation, and a waste of government and judicial resources, to insist on an elaborate particularized showing of a further nexus between the violation and interstate commerce. Such "complex preliminary issue[s]," which are "irrelevant to the liability of the defendant," sidetrack the trial from the substance of the lawsuit and consume resources better devoted elsewhere. *Kansas & Missouri v. Utilicorp United, Inc.*, 110 S. Ct. 2807, 2813 (1990). In this respect, as in other areas of antitrust law, it is best "to avoid weighing down treble-damages actions with \* \* \* 'massive evidence and complicated theories.'" *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741 (1977).

**B. Under An Appropriately Broad View of Sherman Act Coverage, There Is A Sufficient Nexus To Interstate Commerce In This Case**

In reviewing the grant of a motion to dismiss a complaint, "courts must accept as true all material allegations of the complaint, and must construe the complaint in favor

<sup>8</sup> Petitioners contend (Br. 15-20) that an expansive construction of the Sherman Act may thwart the peer review process, thereby jeopardizing the quality of medical care. We note, however, that Congress has largely abated that risk by providing, in 42 U.S.C. 11101 *et seq.*, that persons who follow certain specified peer review procedures shall be immune from damages under federal and state law, except for civil rights actions and parens patriae actions under 15 U.S.C. 15c. 42 U.S.C. 11111.

of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). All well-pleaded facts must be taken as true (see, e.g., *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 411 (1986); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)), and reviewing courts may not affirm a dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' \* \* \* dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. at 746.

Under "this concededly rigorous standard" (*Hospital Bldg. Co.*, 425 U.S. at 746), respondent's interstate commerce allegations, particularly as supplemented by petitioners' representations in the court of appeals, pass muster—on either a "class of activities" or "line of business" approach to the commerce requirement.<sup>9</sup> Respondent identified a class of activities—the provision of ophthalmological services—out of which the challenged boycott arose. That class of activities, the complaint asserted, affects interstate commerce in several respects: physicians and hospitals receive reimbursement through federal Medicare payments (Compl. ¶¶ 24-26; Pet. App. A43); individual hospitals are often constituents of larger,

<sup>9</sup> Although we agree with the court of appeals' resolution of the inquiry, we think the proper question is not whether "the peer review process in general" affects commerce (Pet. App. A19), but whether the subject of the alleged conspiracy—hospital ophthalmological services in general or those of this hospital—affects interstate commerce. The alleged anticompetitive conduct did not tend to restrain the peer review process.

interstate operations (Compl. ¶ 6; Pet. App. A37); and reports concerning peer review proceedings are routinely distributed across state lines, thereby affecting the availability of employment opportunities on a nationwide basis (Compl. ¶ 124; Pet. App. A74-A75). Moreover, in their brief in the court of appeals, petitioners appear to have acknowledged that their particular line of business (*i.e.*, the ophthalmological services provided in this hospital)—if not the challenged conduct in particular—receives out-of-state patients, as well as out-of-state revenues. C.A. Br. 25. See also Pet. App. A19 n.6. On that record, the court of appeals correctly concluded that respondent had shown a sufficient nexus with interstate commerce to withstand the motion to dismiss.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

KENNETH W. STARR  
*Solicitor General*

JAMES F. RILL  
*Assistant Attorney General*

LAWRENCE G. WALLACE  
*Deputy Solicitor General*

MICHAEL BOUDIN  
*Deputy Assistant Attorney General*

LAWRENCE S. ROBBINS  
*Assistant to the Solicitor General*

JAMES M. SPEARS  
*General Counsel*

*Federal Trade Commission*

ROBERT B. NICHOLSON

MARION L. JETTON

*Attorneys*

SEPTEMBER 1990



AUG 10 1990

JOSEPH F. SPANIOL, JR.  
CLERK

**In The  
Supreme Court of the United States**

October Term, 1990

SUMMIT HEALTH, LTD., MIDWAY HOSPITAL  
MEDICAL CENTER, THE MEDICAL STAFF OF  
MIDWAY HOSPITAL MEDICAL CENTER, MITCHELL  
FELDMAN, AUGUST READER, M.D., ARTHUR N.  
LURVEY, M.D., JONATHAN I. MACY, M.D., JAMES J.  
SALZ, M.D., GILBERT PERLMAN, M.D., MARK  
KADZIELSKI AND WEISSBURG AND ARONSON,  
INC.,

*Petitioners,*

v.

SIMON J. PINHAS, M.D.,

*Respondent.*

On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

BRIEF OF THE ARIZONA HOSPITAL ASSOCIATION,  
CALIFORNIA ASSOCIATION OF HOSPITALS AND  
HEALTH SYSTEMS, HEALTHCARE ASSOCIATION  
OF HAWAII, IDAHO HOSPITAL ASSOCIATION,  
MONTANA HOSPITAL ASSOCIATION, NEVADA  
HOSPITAL ASSOCIATION, OREGON ASSOCIATION  
OF HOSPITALS AND WASHINGTON STATE  
HOSPITAL ASSOCIATION, AS AMICI CURIAE IN  
SUPPORT OF PETITIONERS

LEWIS AND ROCA

John P. Frank  
*Counsel of Record*  
Andrew S. Gordon  
Beth Schermer  
40 North Central Avenue  
Phoenix, Arizona 85004  
(602) 262-5311  
*Attorneys for Amici Curiae*

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**QUESTION PRESENTED**

Does a claim under Section 1 of the Sherman Act, which fails to allege any nexus between the allegedly anticompetitive activity and interstate commerce, nevertheless meet the jurisdictional requirements of the Sherman Act, as interpreted by this Court in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980)?

## INTEREST OF THE AMICI CURIAE

*Amici Curiae* are state hospital associations located in the Ninth Circuit.<sup>1</sup> The hospital associations joining in this brief collectively account for 894 hospitals in Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.<sup>2</sup> Each *amicus* association and its member hospitals are committed to maintaining high quality medical and hospital care. An essential part of establishing and monitoring quality care is local hospital peer review — the review by physician medical staff members of the professional practices and patient care at a specific hospital.

## SUMMARY OF ARGUMENT

The Ninth Circuit effectively established a conclusive presumption that all peer review activity affects interstate commerce within the meaning of Section 1 of the Sherman Act, when it held:

[P]eer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. [Peer review] proceedings affect the entire staff at [a hospital] and thus affect the hospital's interstate commerce.

*Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1032 (9th Cir. 1989). This rule is contrary to this Court's holding in

<sup>1</sup> The consents to file this brief, as required by Rule 37, have been separately filed with the Clerk.

<sup>2</sup> The hospital members of each *amicus* association account for the majority of the licensed hospitals in their states. The Arizona Hospital Association represents 83 member hospitals of a total of 100 hospitals in Arizona. The California Association of Hospitals and Health Systems has a membership of 477 hospitals out of a total of 560 licensed facilities in that state. Thirty of the 32 hospitals in Hawaii belong to the Healthcare Association of Hawaii. The Idaho Hospital Association includes 51 of the 52 hospitals in that state as members. Fifty-eight of the 60 licensed hospitals in Montana are members of the Montana Hospital Association; the Nevada Hospital Association similarly includes as members 20 of 27 hospitals in that state. The Oregon Association of Hospitals encompasses 69 member hospitals, with only three nonmember hospitals. The Washington State Hospital Association counts 106 hospital members from a total of 116 hospitals in Washington.

*McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), that a plaintiff must allege and prove a demonstrable nexus between the defendant's alleged anticompetitive activity and interstate commerce and that "as a matter of practical economics" the challenged activity has a substantial effect on interstate commerce.

The present case involves a hospital's decision, as part of its peer review activities, suspending a physician's medical staff privileges. The problems presented by the Ninth Circuit's opinion are twofold. First, it mischaracterizes hospital peer review activities by assuming without basis that these activities always affect a hospital's entire staff and therefore have a substantial effect on interstate commerce. This assumption is factually incorrect; while some hospital peer review activities may affect interstate commerce, others clearly do not. Second, under the Ninth Circuit rule, all peer review activities automatically meet the interstate commerce requirement for Sherman Act jurisdiction. The Ninth Circuit improperly eliminates the necessity of proving any nexus between the illegal conduct and interstate commerce or proving that the illegal conduct has a substantial impact on interstate commerce.

## ARGUMENT

### I. Hospital Peer Review Activities Address Patient Care Practices At Individual Hospitals And Are Fundamentally Noneconomic Activities.

"Hospital peer review" is a catch-all phrase encompassing a number of different types of professional review activities



that take place within individual hospitals.<sup>3</sup> While hospital peer review activities are all generally directed towards establishing and maintaining the quality of care provided in individual hospitals, only a distinct portion of these intrinsically local activities involve limiting or terminating a physician's medical staff privileges or membership. There is certainly no economic basis for assuming, as the Ninth Circuit did below, that alleged anticompetitive activity dealing with the termination of a physician's privileges infects all of a hospital's peer review activities or the hospital in general and interstate commerce.

#### A. The Range of Hospital Peer Review Activities.

Hospital peer review activities are an individual local hospital's mechanisms for reviewing professional practices and patient care at that facility. See *Bredice v. Doctors Hospital*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973). Each of the states represented by the *amici* mandate or regulate hospital peer review as a matter of state law.<sup>4</sup> State peer review statutes define the scope of regulated peer review activities in various ways, and each statute affords in-

<sup>3</sup> The case before the Court involves hospital peer review activities. "Peer review" in yet a more general sense encompasses a range of professional medical review activities, whether related to quality of care or the appropriate utilization of medical and hospital services. Medical societies, certifying specialty boards, third-party payors, government health programs and independent reviewing organizations often engage in some form of organized review, by peers, of professional medical services. McCain, "Protection and Disclosure of Medical Peer Review Information," *Health Law Handbook*, p. 423 (1989).

<sup>4</sup> Ariz. Rev. Stat. Ann. §§ 36-445 *et seq.* (1986 & Supp. 1989); Cal. Bus. & Prof. Code §§ 805 *et seq.*, § 2282 (West 1990), Cal. Civ. Code §§ 43.7-43.8 (West 1982 & Supp. 1990), Cal. Evid. Code §§ 1156-1157 (West 1986 & Supp. 1990); Haw. Rev. Stat. § 624-25.5 (1985), § 663-1.7 (Supp. 1987); Idaho Code §§ 39-1392, 39-1393 (1985 & Supp. 1990); Mont. Code Ann. § 50-16-201 *et seq.*, § 37-2-201 (1989); Nev. Rev. Stat. § 449.476, § 49.265 (1990), Nev. Admin. Code § 449.358; Or. Rev. Stat. §§ 441-015 *et seq.*, § 41.675 (1989); Wash. Rev. Code Ann. § 70.41.200, §§ 4.24.240-4.24.260 (1988 & Supp. 1990).

dividual hospitals latitude in meeting their obligations to review the quality of hospital and medical services. A.R.S. §§ 36-445 *et seq.* (requiring a hospital governing body to require physicians' medical staff members to organize into committees "to review the professional practices within the hospital or center for the purposes of reducing morbidity and mortality and for the improvement of the care of patients provided in the institution"); Wash. Rev. Stat. § 70.41.200(1) (adopting a more detailed laundry list approach in identifying mandated hospital peer review activities to include a quality assurance committee reviewing hospital services, a medical staff privileges sanction procedure for reviewing physician credentials as part of staff privileging and ongoing review, a system for continuous collection of hospital information on negative patient outcomes, and medical education programs intended to improve patient care).

The range of hospital peer review activities can be generalized into three areas: (1) credentialing health care providers for medical staff membership and particular clinical privileges; (2) general monitoring of ongoing professional practices and patient care; and (3) identification of substandard practices and providers. See Gosfield, "Medical Peer Review Protection in the Health Care Industry," 52 Temp. L.Q. 552, 563-64 (1979); Morter, "The Health Care Quality Improvement Act of 1986: Will Physicians Find Peer Review More Inviting?" 74 Va. L. Rev. 1115 (1988). The potential exclusion of a physician from medical staff membership accounts for only a limited portion of the first and third categories.

The first of these peer review activities, credentialing, arises from individual hospitals' responsibility to review the professional competence of physicians seeking medical staff membership and privileges. *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966); *Elam v. College Park Hospital*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156

(1982); *Purcell v. Zimbelman*, 18 Ariz. App. 75, 500 P.2d 335 (1972). Usually, the hospital governing board delegates to its medical staff the duty to establish membership and privilege criteria, and review the education, training, experience and qualifications of specific applicant physicians. "The Report of the Joint Task Force on Hospital-Medical Staff Relationships," American Hospital Association & the American Medical Association, pp. 29-32 (Feb. 1985) ("AHA/AMA Joint Task Force Report"); Ruane, "Antitrust Implications of Medical Peer Review: Balancing the Competing Interests," 15 Pepperdine L. Rev. 111, 114 & n.22 (1987).

Second, hospital peer review encompasses ongoing monitoring of a hospital's practices as measured against quality standards established by the individual institution. Peer review committees within each hospital develop institution-specific quality criteria for medical procedures. They then evaluate ongoing patient care against the criteria. AHA/AMA Joint Task Force Report, pp. 32-33. For example, the primary hospital accrediting organization, the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") requires a hospital's medical staff to monitor, as part of basic quality review programs, a broad spectrum of patient care concerns, including surgical cases, drug usage, the quality of medical records, pharmacy and therapeutic functions and risk management activities relating to patient care and safety. JCAHO Accreditation Manual for Hospitals, MS.6.1, pp. 111-15 (1990). These continuous monitoring activities allow hospitals to identify potential quality of care concerns based upon the specific quality standards set by the institution.

Third, hospital peer review activities also involve reviews of individual professional practices and identification of sub-standard physicians. In some cases, this area of peer review activities may result in disciplinary action against a physician, including potential limitation or termination of medical staff membership or clinical privileges. *Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986)

(summary suspension of medical staff member's privileges because of unprofessional conduct); *Sarin v. Samaritan Health Center*, 813 F.2d 755 (6th Cir. 1987) (termination of medical staff privileges and membership because of professional competence concerns). The subject of the instant case involves one aspect of this element of peer review.

However, exclusionary action is by no means the primary focus of this area of hospital peer review. A peer review committee engaged in these activities may also identify specific patient care concerns and, in response, may impose educational and training requirements on an individual practitioner, specific supervisory requirements, concurrent review of a practitioner's work or retrospective review of a practitioner's patient records. See AHA/AMA Joint Task Force Report, pp. 33-34; *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984) (peer review committee requirement that physician must attend additional medical education); *Setliff v. Memorial Hospital of Sheridan County*, 850 F.2d 1384 (10th Cir. 1988) (peer review results in requirement that physician secure second opinion before performing specific procedure); *Rhee v. El Camino Hospital District*, 201 Cal. App. 3d 477, 247 Cal. Rptr. 244 (1988) (peer review committee requires ongoing monitoring of physician's surgical cases during extended probationary period).

The Ninth Circuit in this case wrongly assumed, without engaging in any factual or economic analysis, that peer review activities always affect all medical staff members and the hospital itself and therefore always have a substantial effect on interstate commerce. As shown above, the scope of hospital peer review is wide-ranging; the effects of these various peer review activities cannot be generalized. A credentialing or disciplinary decision may affect an individual physician, but not affect any other medical staff member's ability or opportunity to provide care at the facility. General monitoring of the quality of medical practices may involve specific physicians in a given specialty without affecting



other medical staff members or the provision of hospital services.

### **B. Peer Review Is a Fundamentally Noneconomic Activity.**

The purposes and processes of peer review discussed above lead to the conclusion that peer review is a fundamentally noneconomic activity. The United States Congress recognized this point in the legislative history of the Health Care Quality Improvement Act of 1986:

Unlike other activities that may trigger antitrust lawsuits, properly limited peer review plays no essential or important economic role in the practice of medicine. Doctors who are sufficiently fearful of the threat of litigation will simply not do meaningful peer review.

H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 6384, 6385.

Congress' reasoning rests on the very basis of peer review. A hospital's peer review activities do not bring the consumer of health care services and the health care provider together. As a general matter, no fee is charged for peer review activities. Peer review activities do not necessarily affect either the frequency with which medical services are provided or the economic terms of providing those medical services. Nor do peer review activities affect the demand for medical services. The demand for these services is, in large part, inelastic. See *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987).

Likewise, prices for medical services are not generally bargained for between patient and hospital or patient and doctor but rather are most frequently set by negotiation between third-party payors and providers irrespective of the particular physician-patient-hospital relationship involved. See *Kartell v. Blue Shield of Massachusetts*, 749 F.2d 922, 925-26 (1st Cir. 1984), cert. denied, 471 U.S. 1029 (1985);

*Ball Memorial Hospital v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986); *Hospital Corp. of America*, 807 F.2d at 1388. Hospital peer review activities do not affect the price at which a hospital will provide its services. The Ninth Circuit standard ignored these fundamental realities of peer review, without factual support.

### **C. Peer Review Activities May or May Not Substantially Affect Interstate Commerce.**

As detailed above, hospital peer review activities are largely local, and they may or may not have an effect on interstate commerce. For example, a surgeon may be required as part of a peer review proceeding to attend additional continuing medical education as a condition for maintaining his privileges. Contrary to the Ninth Circuit's holding below, in a challenge by the surgeon under the Sherman Act, defendants legitimately may dispute whether such educational activities in any way affect the flow of interstate commerce. Are more patients operated on? Are the hospital or physician fees for services increased? These fact-intensive questions must be answered in each antitrust case.

Even when a physician has her privileges restricted or revoked as a result of peer review activities, and is ultimately excluded from the staff, an effect on interstate commerce does not inevitably follow. The excluded physician's patients may well be treated by different doctors at the same hospital and at the same price. In that case there is no demonstrable effect on interstate commerce. Even if an excluded doctor takes his patients across the street to another hospital, there is no reason to assume that action affects the volume or price of hospital services in that same town. See *Sarin v. Samaritan Health Center*, 813 F.2d at 758.

There is simply no basis to assume, as the Ninth Circuit did, that the exclusion of a physician from the staff of a hospital inevitably results in any effect on interstate commerce. Exclusion does not necessarily have an economic anticompetitive effect on the hospital or physician. See, e.g., *Thompson v. Wise General Hospital*, 707 F. Supp. 849, 855 (W.D.



Va. 1989), *aff'd*, 896 F.2d 547 (4th Cir. 1990), *petition for cert. filed*, April 27, 1990 (no showing that "gain or loss of one [doctor] would have a noticeable effect on the amount of competition"); *Hayden v. Bracy*, 744 F.2d at 1343 (peer review requirement on physician to attend three months of post-graduate training did not have substantial competitive impact, since others covered his practice until his return).

On the other hand, cases may exist in which the result of a particular peer review activity does affect interstate commerce. For example, in a highly specialized practice area, exclusion of a physician from the staff in a given hospital may mean that the services are performed at a different hospital in a different state. There may be types of medicine where the demand is elastic or where the price is sufficiently negotiable that the presence or absence of given physicians may affect the quantity of dollars or goods that flow across state lines.

In short, the "practical economic analysis" must be case-specific. Broad generalizations in this area ignore the varied nature and effects of hospital peer review activities.

## II. A Per Se Rule That Hospital Peer Review Activity Affects Interstate Commerce Is Not Required By *McLain*.

### A. *McLain* Does Not Mandate or Support the Ninth Circuit's Decision in *Pinhas*.

This Court's most recent ruling on the interstate commerce requirement of the Sherman Act is in *McLain v. Real Estate Board of New Orleans*. We believe, along with the majority of circuits considering this issue<sup>5</sup> and many com-

<sup>5</sup> See, e.g., *Stone v. William Beaumont Hospital*, 782 F.2d 609, 613-14 (6th Cir. 1986); *Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985); *Hayden v. Bracy*, 744 F.2d 1338, 1342-43 (8th Cir. 1984); *Furlong v. Long Island College Hospital*, 710 F.2d 922, 925, 926 (2d Cir. 1983); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 719, 722-24 (10th Cir. 1980).

mentators<sup>6</sup> that *McLain* requires a plaintiff to plead and prove a demonstrable nexus between the alleged illegal activity and interstate commerce. The minority view only requires that the plaintiff prove that "defendants' business activities, independent of the violations, affected interstate commerce." *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980).<sup>7</sup>

In *Pinhas*, the Ninth Circuit's application of the *Western Waste* test to peer review resulted in Sherman Act jurisdiction whenever any hospital-specific peer review activities are challenged. The expansive test adopted in *Western Waste* and adapted to peer review in *Pinhas* effectively reads the interstate commerce requirement out of the Sherman Act, ignores critical analysis found in *McLain*, and automatically transports fundamentally local hospital peer review activity into the federal realm.

This Court held in *McLain* that to establish jurisdiction in a Sherman Act case, the defendants' activities infected by the price-fixing conspiracy must be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved." 100 S. Ct. at 511. The plaintiff has the burden of proof. The *McLain* Court then tested the facts against this standard, and determined that they demonstrated the existence of a practical economic effect:

It is clear, as the record shows, that the function of respondent real estate brokers is to bring the buyer and seller together on agreeable terms. For this service the

<sup>6</sup> P. Areeda and H. Hovenkamp, *Antitrust Law*, § 232.1, at 238-39 (Supp. 1989); P. Kissam, W. Webber, L. Bigus & J. Holzgraefe, "Antitrust and Hospital Privileges: Testing the Conventional Wisdom," 70 Calif. L. Rev. 595, 634 (1982); Note, "Expanding Federal Antitrust Jurisdiction: A Close Look at *McLain v. Real Estate Board, Inc.*," 19 Hous. L. Rev. 143, 168-73 (1981).

<sup>7</sup> See, e.g., *Shahawy v. Harrison*, 778 F.2d 636, 639-40 (11th Cir. 1985), *amended*, 790 F.2d 75 (11th Cir. 1986); *Cardio-Medical Assocs. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68, 74-75 (3d Cir. 1983).

broker charges a fee generally calculated as a percentage of the sale price. Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce.

100 S. Ct. at 511. As discussed in Section I, this sort of practical economic analysis frequently yields a much different result when applied as a factual matter to peer review activities. Peer review is not a commercial activity bringing the patient and physician together for a fee, nor do peer review activities necessarily affect the frequency, price or medical availability of the provision of medical services.

Those advocating a broad reading of *McLain* misconstrue the Court's statement that:

Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful.

100 S. Ct. at 509. *McLain* involved a brokerage price-fixing case where there was simply no way to separate the price-fixing activity on the brokerage fee from brokerage services generally. Therefore, the plaintiffs met the interstate commerce requirement once they demonstrated that real estate brokerage activities in general affected interstate commerce. If the Court had intended to adopt the broader view, it would not have been necessary to engage in its practical economic analysis or concern itself with whether the price-fixing activity infected the defendants' business. The only question would have been whether there was any relationship between the defendants' business and interstate commerce.

### B. *Pinhas* Ignores *McLain's* Standards.

Initially, the Ninth Circuit opinion below seemed to recognize that it is not appropriate to include any and all hospital activities in analyzing the interstate commerce jurisdictional question. The court held that:

*Pinhas* must show that "as a matter of practical economics" the activities of the appellees — the peer review process in general — have a "not insubstantial effect on the interstate commerce involved."

894 F.2d at 1032. However, in the next sentence the Ninth Circuit assumed its conclusion rather than engaging in any economic analysis, holding that plaintiff "need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at [the hospital] and thus affect the hospital's interstate commerce." *Id.* (emphasis supplied). As shown in the first section of this brief, there can be very great dispute over the interstate impact of particular peer review activities. The court's broad overgeneralization finds no support in the record and demonstrates a profound misunderstanding of the scope and individuality of peer review activities.

*Amici* do not urge a blanket rule that hospital peer review activities do not affect interstate commerce; what we object to is the conclusive presumption adopted by the Ninth Circuit. The overwhelming majority of courts which have examined the relationship between peer review activities and the Sherman Act's interstate commerce requirement correctly concluded that an excluded or disciplined physician must allege, and if challenged, prove, that the particular exclusionary activities themselves have a substantial effect on interstate commerce. See, e.g., *Sarin v. Samaritan Health Center*, 813 F.2d 755 (6th Cir. 1987); *Doe v. St. Joseph's Hospital of Fort Wayne*, 788 F.2d 411 (7th Cir. 1986); *Stone v. William Beaumont Hospital*, 782 F.2d 609 (6th Cir. 1986); *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984); *Furlong v. Long Island College Hospital*, 710 F.2d 922 (2d Cir. 1983);



*Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715 (10th Cir. 1980) (en banc). In some of these cases the plaintiff makes a sufficient showing of substantial effect upon interstate commerce; in others the opposite occurs. However, each of those cases focuses, as this Court mandated in *McLain*, on the practical economics of how the allegedly exclusionary peer review activities affected interstate commerce. The *Pinhas* court improperly bypasses that necessary analysis.

The Ninth Circuit assumes the conclusion that peer review always affects interstate commerce. As a result, the Ninth Circuit's decision mandates federal antitrust jurisdiction in every antitrust challenge to peer review, no matter how local the specific activity involved. This result is incorrect under *McLain*.

#### CONCLUSION

The judgment of the Ninth Circuit should be vacated and the judgment in the district court affirmed.

RESPECTFULLY SUBMITTED.

LEWIS AND ROCA

August 10, 1990

By

\_\_\_\_\_  
John P. Frank  
*Counsel of Record*

Andrew S. Gordon  
Beth Schermer  
40 North Central Avenue  
Phoenix, Arizona 85004  
(602) 262-5311  
*Attorneys for Amici Curiae*





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# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1989

SUMMIT HEALTH, LTD., et al.,  
*Petitioners,*

VS.

SIMON J. PINHAS, M.D.,  
*Respondent.*

**BRIEF AMICI CURIAE SUBMITTED BY THE STATES  
OF CALIFORNIA, ALASKA, ARIZONA, ARKANSAS, COL-  
ORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO,  
ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHU-  
SETTS, MINNESOTA, OHIO, PENNSYLVANIA, TEXAS,  
UTAH, VIRGINIA, WASHINGTON and WEST VIRGINIA**

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JOHN K. VAN DE KAMP,  
Attorney General of the  
State of California

ANDREA S. ORDIN

Chief Assistant Attorney General

SANFORD N. GRUSKIN

Assistant Attorney General

\* KATHLEEN E. FOOTE

Deputy Attorney General

455 Golden Gate Avenue, Room 6000

San Francisco, California 94102

Telephone: (415) 557-3054

\* Counsel of Record on  
Behalf of Amici States

(Additional Counsel Listed Inside)

## LIST OF COUNSEL

### Counsel for the State of Alaska

DOUGLAS B. BAILY  
Attorney General  
Room 422, State Capitol  
Juneau, Alaska 99811  
(907) 465-3620

### Counsel for the State of Arizona

ROBERT K. CORBIN  
Attorney General  
ALISON J. BUTTERFIELD  
Chief Counsel  
Antitrust Division  
1275 West Washington  
Phoenix, Arizona 85007  
(602) 542-4751

### Counsel for the State of Arkansas

JOHN STEVEN CLARK  
Attorney General  
JEFFREY A. BELL  
Deputy Attorney General  
200 Tower Building  
4th and Center Streets  
Little Rock, Arkansas 72201  
(501) 682-2007

### Counsel for the State of Colorado

DUANE WOODARD  
Attorney General  
RICHARD FORMAN  
Solicitor General  
1525 Sherman Street  
Denver, Colorado 80203  
(303) 866-5158

### Counsel for the State of Connecticut

CLARINE NARDI RIDDLE  
Attorney General  
ROBERT M. LANGER  
Assistant Attorney General  
110 Sherman Street  
Hartford, Connecticut 06105  
(203) 566-5374

### Counsel for the State of Florida

ROBERT A. BUTTERWORTH  
Attorney General  
The Capitol  
Tallahassee, Florida 32399-1050  
(904) 488-9105

### Counsel for the State of Hawaii

WARREN PRICE, III  
Attorney General  
ROBERT A. MARKS  
Deputy Attorney General  
TED GAMBLE CLAUDE  
Deputy Attorney General  
Department of the Attorney General  
425 Queen Street, 3rd floor  
Honolulu, Hawaii 96813  
(808) 548-6744

### Counsel for the State of Idaho

JIM JONES  
Attorney General  
CATHERINE K. BROAD  
Deputy Attorney General  
Business Regulation Division  
State House  
Boise, Idaho 83720  
(208) 334-2400

### Counsel for the State of Illinois

NEIL F. HARTIGAN  
Attorney General  
ROBERT RUIZ  
Solicitor General  
CHRISTINE ROSSL  
Senior Assistant Attorney General  
100 W. Randolph Street, 12th Floor  
Chicago, Illinois 60601  
(312) 917-3000

### Counsel for the State of Iowa

THOMAS J. MILLER  
Attorney General  
JOHN R. PERKINS  
Deputy Attorney General  
Hoover State Office Building  
Des Moines, Iowa 50319  
(515) 281-3349

BEST AVAILABLE COPY

(Additional Counsel Listed Inside Back Cover)

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**BRIEF AMICI CURIAE SUBMITTED BY THE STATES  
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UTAH, VIRGINIA, WASHINGTON and WEST VIRGINIA**

### INTRODUCTION

The States of California, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Ohio, Pennsylvania, Texas, Utah, Virginia, Washington and West Virginia (hereinafter "Amici States") submit this brief in support of the respondent Simon J. Pinhas, M. D. (hereinafter "Dr. Pinhas"). The decision of the Ninth Circuit in *Pinhas v. Summit Health, Ltd., et al.*, 894 F.2d 1024 (9th Cir. 1989), should be affirmed.



## INTERESTS OF AMICI STATES

The Attorneys General of the Amici States are charged by law with the duty to enforce their states' antitrust laws, as well as the federal antitrust laws. In addition, they represent their states and political subdivisions in treble damage actions under the federal antitrust laws and are authorized by law to bring such actions as *parens patriae* on behalf of the natural citizens of their states.<sup>1</sup>

The Amici States, in their capacity as *parens patriae*, play a major role in federal antitrust enforcement. In the national enforcement scheme, the historic state role has often involved federal prosecution of violations more local in nature than those typically challenged by the United States Department of Justice. Therefore, the Amici States have a substantial interest in ensuring that federal courts apply the antitrust laws in a manner consistent with underlying congressional policy, this Court's past decisions, and sound public policy.<sup>2</sup>

Petitioners have invited the Court, through a narrowing of prior decisional law, to restrict access to federal courts on antitrust issues. The interest of Amici States is to resist the imposition or elevation of hurdles which antitrust plaintiffs must overcome in order to be heard on the merits of their claims. Further, it is to assure that, in view of the absence of certain traditionally federal causes of action under state antitrust law, antitrust plaintiffs not be left without a forum by virtue of any such proposed restriction on federal court access.

## SUMMARY OF ARGUMENT

The Ninth Circuit ruling should be affirmed.

<sup>1</sup> 15 U.S.C. § 15c (1988).

<sup>2</sup> For the same motives, the Amici States are interested in this Court's resolution of inconsistencies among the Circuits in current applications of the jurisdictional test. Leading cases from the various Circuits are cited in the Petition for Writ of Certiorari, at pages 6 and 7. See, also, *Anesthesia Advantage, Inc. v. Metz Group*, \_\_\_\_ F.2d \_\_\_\_ (CA 10, No. 89-1073, 8/15/90).

Sherman Act jurisdiction turns upon the extent of the power of Congress to regulate commerce. Because that power is extremely broad, extending even to small, local activities, the jurisdictional nexus with interstate commerce should be limited to a showing that the general business activities of the defendant have the required effect. In focusing particularly on defendants' peer review activities the Ninth Circuit applied a narrower standard than necessary under this definition, but reached the correct result.

Affirming a broad standard will promote the intent of Congress in enacting the antitrust laws and fully implement the Court's reasoning in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980). It will also avoid the dangers inherent in a narrower articulation of the requirement, of leaving certain antitrust plaintiffs without a forum under either federal or state law. It would be inappropriate for the Court to attempt indirectly, through a jurisdictional determination, to fashion an antitrust exemption for participants in professional peer review.

## ARGUMENT

### I

## THE JURISDICTIONAL REQUIREMENT OF THE SHERMAN ACT IS SATISFIED IF THE DEFENDANT'S GENERAL BUSINESS ACTIVITIES HAVE AN EFFECT ON INTERSTATE COMMERCE

In an action alleging violations of the Sherman Act, an allegation that the defendants' general business activities have an effect on interstate commerce will meet the jurisdictional requirement of a nexus with interstate commerce. Contrary to petitioners' assertions, a plaintiff need not show or allege that the defendants' precise anticompetitive conduct had an effect on interstate commerce.

The broad interpretation of Sherman Act jurisdiction which Amici States urge, is compelled by prior decisions of this Court and the legislative history of the Sherman Act. This Court has long recognized that Congress intended that the reach of the Sherman Act extend to the outer limits of its constitutional power



to regulate under the Commerce Clause.<sup>3</sup> Therefore, Sherman Act jurisdiction turns upon the extent of the power of the Congress to regulate the commerce in question.<sup>4</sup> If Congress has power to regulate a defendant's business activities under the Commerce Clause, Sherman Act jurisdiction exists accordingly over competitive restraints occurring in connection therewith.

A court hence should ordinarily focus on the interstate effects of the business activities of the defendant. *McLain v. Real Estate Board*, 444 U.S. 232, 242 (1980); *Western Waste Service v. Universal Waste Control*, *supra*, 616 F.2d at 1097 n.2. This focus logically arises from the underlying question, Congressional power to regulate the defendant's activities.<sup>5</sup> Areeda & Hovenkamp, *Antitrust Law*, ¶ 232.1c at 223 (Supp. 1988).

Congress' power under the Commerce Clause is very broad power, even extending to very small, remote and local activities that, in the aggregate, have some effect on interstate commerce.<sup>6</sup> For example, in *Wickard v. Filburn*, 317 U.S. 111 (1942) (cited

<sup>3</sup> 21 Cong. Rec. 2457, 3147, 6314; *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558 (1944); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974). See also, legislative history of 1980 Antitrust Improvements Act, 1980 U.S. Code Cong. & Adm. News 2716, 2733.

<sup>4</sup> *Western Waste Service v. Universal Waste Control*, 616 F.2d 1094, 1096 (9th Cir.) cert. denied 449 U.S. 869 (1980). See, Note, *Sherman Act 'Jurisdiction' in Hospital Staff Exclusion Cases*, 132 U. Pa. L. Rev. 121 (1983).

<sup>5</sup> The opinion in *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738 (1976), suggests the possibility that courts may be free to look at the interstate commerce links with plaintiff's business in addition to defendant's. But to focus exclusively on the plaintiff would be error. *Id.*, at 742 n.1. See, also, *Cardio-Medical Assoc. v. Crozer-Chester Medical Center*, 721 F.2d 68, 74 (3d Cir. 1983), reversing the lower court's ruling that "the identified aspect of interstate commerce must relate to the activities of plaintiffs, and not defendants." *Cardio-Medical*, 552 F.Supp. 1170, 1177 (E.D.Pa. 1982).

<sup>6</sup> The Court has long emphasized that it is the existence rather than the size of an interstate effect that confers jurisdiction. *Apex Hosiery Co.*

in *McLain*), the Court held that Congress had the power to regulate a farmer's production of wheat for personal consumption, which, although "trivial by itself [is substantial when] taken together with that of many others..." 317 U.S. at 128. The Sherman Act has been applied, without any consideration of aggregate effect on interstate commerce, to such essentially intrastate activities as residential real estate sales [*McLain*, 444 U.S. 232], county bar association fee schedules [*Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)], and local attempts to block a hospital expansion [*Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976)].

The broad interpretation of Sherman Act jurisdiction is consistent with the Court's decision in *McLain*, *supra*, 444 U.S. 232 (1980). The *McLain* Court refused to "take that long backward step" in jurisdictional analysis under the Sherman Act that a restrictive interpretation would imply. *Id.* at 244-245. Instead, it reversed both lower courts, which had failed to find the requisite interstate commerce nexus in an alleged fee-fixing conspiracy among local realtors—activity that the Fifth Circuit characterized as "the quintessential local product".<sup>7</sup> The Court looked for, and found, the requisite nexus in the defendants' brokerage activity generally, concluding:

"Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful."

444 U.S. at 242-43. The Court expressed particular concern that jurisdiction not "be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect[.]", holding instead that liability could be established "by proof of either an unlawful purpose or an anticompetitive effect." *Id.* at 243 (emphasis in the original). In the latter case, the Court cautioned, neither plaintiff's failure to quantify the adverse impact nor even an inability to prove legally cognizable damages, should

*v. Leader*, 310 U.S. 469, 485 (1940). Areeda & Hovenkamp, *supra*, ¶ 232.1a at 221.

<sup>7</sup> *McLain v. Real Estate Board*, 583 F.2d 1315, 1319 (5th Cir. 1978).

defeat jurisdiction. *Id.* These articulated policy considerations suggest that the Court's primary objective in *McLain* was to expand the Sherman Act's reach to its furthest limits under the Commerce Clause, and hence to the most inclusive standard within reason.<sup>8</sup>

The broad interpretation of the jurisdictional requirement which Amici States urge, is also consistent with the realities of interstate commerce itself. As Areeda & Hovenkamp have pointedly observed:

"Once one focuses on the inherent effects of a trade restraint in a national economy together with the long-held rule that the magnitude of interstate effects is irrelevant, there are astonishingly few offenses to antitrust principles that do not 'affect commerce.' There may indeed be an understandable impulse to rid antitrust law of trivia. Perhaps indeed there should be a de minimis threshold, but it would be hard to administer, and the fortuity of state lines is much too clumsy a vehicle for distinguishing the trivial from the important."

Antitrust Law, ¶ 232.1e at p. 228 (1988 Supp.).<sup>9</sup> The position petitioners advocate, indeed, could constitute an invitation to treat plaintiffs differently depending on how close they may be to a state boundary.

A narrower standard, particularly one as narrow as petitioners have suggested, would result in a patchwork of judicially created exclusions scissored from the otherwise cohesive, comprehensive reach of Congressional power and antitrust law over all mainstream commerce. Such a situation would only exacerbate the

<sup>8</sup> Where jurisdiction is invoked on the basis of facts totally unrelated to the alleged conduct, e.g. because a holding company of a local defendant also does business in other states, common sense might dictate a somewhat narrower view. See, I E. Kintner, *Federal Antitrust Law*, § 6.5, n. 421, at page 295 (Supp. 1990).

<sup>9</sup> Pretrial dismissals on interstate commerce grounds are disfavored. *McLain*, 444 U.S. at 246; *Tiger Trash v. Browning-Ferris Indus., Inc.*, 560 F.2d (7th Cir. 1979), cert. denied, 439 U.S. 1034 (1979).

inconsistent treatment of antitrust plaintiffs which has already arisen from the differing interpretations of *McLain*.<sup>10</sup>

## II

### THE NINTH CIRCUIT'S FOCUS ON THE HOSPITAL PEER REVIEW PROCESS THE RESULTED IN A NARROWER STANDARD OF JURISDICTION THAN WAS REQUIRED BY THE SHERMAN ACT

In this case, the Ninth Circuit did not simply look at the nexus between interstate commerce and the general business activities of defendants. Instead it focused on the effect or probable effect of defendants' hospital staff peer review process, and the nexus between that process and interstate commerce. *Pinhas*, 894 F.2d at 1032. In doing so, the Ninth Circuit may have intended to apply a narrower standard than is actually required by the Sherman Act.<sup>11</sup> Since the Ninth Circuit correctly found Sherman Act jurisdiction under this standard, Sherman Act jurisdiction would exist *a priori* under the broader standard urged by Amici States.

The Ninth Circuit's conclusion that the hospital peer review process affects interstate commerce is entirely justified. In enacting the *Health Care Quality Improvement Act of 1986*, 42 U.S.C. § 11101 et seq., Congress made explicit findings of a nationwide medical care quality problem beyond the ability of individual

<sup>10</sup> The inconsistency of results both among and within Circuits has been described critically in Areeda & Hovenkamp, *supra*, ¶ 232.1d at 225-226; Note, *supra*, 132 U. Pa. L. Rev. 121 (1983); Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Cal. L. Rev. 595, 614, 629-633 (1982); and ABA, *Antitrust Law Developments (Second)* (Second Supp.) at 24-28. See, also, note 2.

<sup>11</sup> Peer review is one out of perhaps many examples of defendants' general business activities. It is not clear from the opinion whether the Ninth Circuit singled it out simply because the details were most fully pleaded, or because the court believed itself limited by law to scrutiny of that activity alone. Compare, *Musick v. Burke Vending & Catering Corp.* (CA 9, No. 89-55310, 9/7/90).



States to address adequately. Professional peer review and the interhospital, interstate exchange of information about peer review (the abuse of which Dr. Pinhas complains here), with limited antitrust immunity, is Congress' prescribed solution to the national problem.<sup>12</sup>

Even without this Congressional perspective, it can readily be seen that the cumulative impact of peer review, whether carried out by Midway Hospital alone or by many hospitals, would have a substantial effect on interstate commerce and on the degree of competition in the market for physician services. The cumulative effects of interstate communication of peer review results would be equally substantial.

### III

#### CONTRARY TO THE INTENT OF CONGRESS, THE NARROW STANDARD OF SHERMAN ACT JURISDICTION PROPOSED BY PETITIONERS MIGHT FORECLOSE REMEDIES FOR CERTAIN ANTICOMPETITIVE CONDUCT

Petitioners argue that a plaintiff must allege or show that the precise anticompetitive restraint in question has an effect upon interstate commerce.<sup>13</sup> Such a standard is inconsistent with Congressional intent that the Sherman Act reach to the outer limit of its power to regulate commerce, and, if adopted, would work great mischief in antitrust enforcement.

<sup>12</sup> Petitioners have not suggested that Congress was acting beyond its powers in enacting the 1986 Act. A ruling that recognized Congress' power to promote the peer review process through regulation but not its power to prohibit anticompetitive activities undertaken in connection with that process would be anomalous indeed!

<sup>13</sup> Petitioners further urged below that the interstate nexus analysis be limited to an examination of Dr. Pinhas' ophthalmic practice at Midway Hospital and the effect of its cancellation upon competition. See, e.g., Defendants' Reply Brief to the District Court, Joint Appendix at 276-277. It is unclear whether they continue to advocate this approach.

Petitioners' standard would have a chilling effect on both governmental and private antitrust prosecutions. It would discourage meritorious actions by creating doubt as to Sherman Act jurisdiction. In order to measure the effects of the restraint itself courts would be inclined to focus on the injury to the plaintiff; accordingly, the same violation might receive different treatment depending on who sued.

Although State antitrust law in some cases would provide an alternate forum, in others it would not.<sup>14</sup> Because of gaps in State antitrust laws, certain violations essentially local in nature might be left unredressed. For example, mergers of purely or largely local business entities might fall outside a narrow "interstate commerce" standard, thereby precluding challenge under the FTC Act § 5 and Clayton Act § 7,<sup>15</sup> upon which States and other private parties have traditionally and properly relied, and leaving no other remedy.<sup>16</sup> Monopolization is not prohibited by the laws of many States. Essentially local acts of monopolization might be unchallengeable under a narrow interpretation of the interstate

<sup>14</sup> The broad standard Amici States advocate would not displace antitrust enforcement under state law. Broad application of both sets of laws, with consequent overlapping jurisdiction, is fully consistent with the intent of Congress and of state law. *California v. ARC America Corp.*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1661, 1666 (1989); and see, e.g. Texas Business & Commerce Code, § 15.25(b).

<sup>15</sup> Congressional history indicates that FTC Act and Clayton Act jurisdiction are to be as broad as that of the Sherman Act, notwithstanding the differences in language. The FTC Act was amended in 1974 and the Clayton Act § 7 in 1980 to add the phrase "or in any activity affecting commerce" expressly to make their reach coextensive with the Sherman Act and with Congress' authority under the Commerce Clause. 1974 U.S. Code Cong. & Adm. News, 7702, 7712-13; 1980 U.S. Code Cong. & Adm. News, 2716, 2733.

<sup>16</sup> Only a handful of states (Alaska, Arkansas, Hawaii, Maine, Nebraska, Texas, Washington) have antimerger statutes paralleling Section 7. In addition, a few states have statutes that prohibit anticompetitive share acquisitions but not asset acquisitions. ABA Antitrust Section: Monograph No. 15, *Antitrust Federalism: The Role of State Law* (1988), at page 61.



commerce requirement of the federal antitrust laws.<sup>17</sup> Moreover, many States do not have *parens patriae* authority under their own antitrust laws, but must rely on the Sherman Act for its exercise.<sup>18</sup> ABA Antitrust Section: Monograph No. 15, *supra*, at pages 100-101.

#### IV

#### THIS COURT'S INTERPRETATION OF THE JURISDICTIONAL REQUIREMENT OF THE SHERMAN ACT SHOULD NOT BE INFLUENCED BY ANY ALLEGED NEED TO EXEMPT THE PEER REVIEW PROCESS FROM THE FEDERAL ANTITRUST LAWS. EXEMPTION IS A POLICY DECISION FOR CONGRESS, NOT THE COURTS

Some lower courts have evidenced concern that antitrust challenges to peer review proceedings by disgruntled physicians carry the danger of frivolous litigation, burden the health care system with unnecessary costs and time expenditure, and frustrate efforts by physicians and administrators to ensure high quality medical care.<sup>19</sup> The Amici States submit that, if indeed this concern is justified, it is for the Congress, not the courts, to fashion an appropriate solution. A decision by this Court attempting to resolve this concern in the guise of a jurisdictional determination would necessarily have implications far broader than peer review, impacting numerous other areas of commerce and competition, in fundamental conflict with Congressional purpose as delineated above.

<sup>17</sup> States without prohibitions on unilateral monopolization include Arkansas, Colorado, Delaware, Georgia, Kansas, Montana, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, and Wyoming. ABA Antitrust Section: Monograph No. 15, *supra*, at page 53.

<sup>18</sup> The Commonwealth of Pennsylvania has no state antitrust statutes at all, but relies exclusively for enforcement on the federal laws.

<sup>19</sup> See, e.g., *Seglin v. Esau*, 769 F.2d 1274, 1283-84 (7th Cir. 1985).

Through enactment of the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§ 11101 et seq.<sup>20</sup>, Congress has already provided limited antitrust immunity for peer review activities meeting specified due process standards, and for participants therein. That statute affords an apt illustration of the weighing and balancing of social issues and potentially contradictory interests which are the hallmark of Congressional policy-making.<sup>21</sup>

By contrast, use of the interstate commerce nexus yardstick to confer immunity in peer review matters deemed by lower court judges to be "marginal"<sup>22</sup>, ignores the need to balance these factors, constitutes a *sub silentio* exercise of legislative power, and is far "too clumsy a vehicle for distinguishing the trivial from the important."<sup>23</sup>

<sup>20</sup> This statute was recently relied upon by the United States District Court for the Central District of California in dismissing a plaintiff's antitrust claims regarding defendants' peer review activities, and thus presents a potentially potent shield against antitrust liability for peer review defendants. *Austin v. McNamara*, 731 F.Supp. 934 (C.D. Ca. 1990).

<sup>21</sup> Considered and balanced, *inter alia*, are the need for improved medical care, the dangers of anticompetitive abuse of peer review power, the potential chilling effects of legal challenges, due process safeguards, confidentiality of information, and flexibility during emergencies.

<sup>22</sup> Several cases suggesting "marginality" of peer review proceedings to antitrust law are cited in the Brief of the California Assoc. of Hospitals and Health Systems as Amicus Curiae in Support of Petition, at page 13.

<sup>23</sup> Areeda & Hovenkamp, *supra*, at 228.

**CONCLUSION**

The decision of the Court of Appeals should be affirmed.

DATED: September 12, 1990

Respectfully submitted,

JOHN K. VAN DE KAMP,  
Attorney General of the  
State of California

ANDREA S. ORDIN  
Chief Assistant Attorney General

SANFORD N. GRUSKIN  
Assistant Attorney General

\* KATHLEEN E. FOOTE  
Deputy Attorney General

By KATHLEEN E. FOOTE  
Deputy Attorney General

\* Counsel of Record on  
Behalf of Amici States

## LIST OF COUNSEL—(Continued)

### Counsel for the State of Maine

JAMES E. TIERNEY

Attorney General

STEPHEN L. WESSLER

Deputy Attorney General

Chief, Consumer and Antitrust Division

State House Station 6

Augusta, Maine 04333

(207) 289-3661

### Counsel for the State of Maryland

J. JOSEPH CURRAN, JR.

Attorney General

200 St. Paul Place

Baltimore, Maryland 21202

(301) 576-6470

### Counsel for the Commonwealth of Massachusetts

JAMES M. SHANNON

Attorney General

GEORGE K. WEBER

Assistant Attorney General

Chief, Antitrust Division

One Asburton Place

Boston, Massachusetts 02108

(617) 727-2200

### Counsel for the State of Minnesota

HUBERT H. HUMPHREY, III

Attorney General

STEPHEN P. KILGRIFF

Deputy Attorney General

THOMAS F. PURSELL

Assistant Attorney General

200 Ford Building

117 University Avenue

St. Paul, Minnesota 55155

(612) 296-2622

### Counsel for the State of Ohio

ANTHONY J. CELEBREZZE, JR.

Attorney General

DOREEN C. JOHNSON

Assistant Attorney General

65 East State Street, Suite 708

Columbus, Ohio 43266-0590

(614) 466-4328

### Counsel for the Commonwealth of Pennsylvania

ERNEST D. PREATE, JR.

Attorney General

EUGENE F. WAYE

Chief Deputy Attorney General

Antitrust Section

CARL S. HISIRO

Senior Deputy Attorney General

1435 Strawberry Square

Harrisburg, Pennsylvania 17120

(717) 787-4530

### Counsel for the State of Texas

JIM MATTOX

Attorney General

MARY F. KELLER

First Assistant Attorney General

LOU MCCREARY

Executive Assistant Attorney General

ALLENE D. EVANS

Assistant Attorney General

Chief, Antitrust Division

Capitol Station

P. O. Box 12548

Austin, Texas 78711

(512) 463-2100

### Counsel for the State of Utah

R. PAUL VAN DAM

Attorney General

SANDER MOOY

Assistant Attorney General

236 State Capitol

Salt Lake City, Utah 84114

(801) 538-1331

### Counsel for the State of Virginia

MARY SUE TERRY

Attorney General

Supreme Court Building

101 North 8th Street

Richmond, Virginia 23219

(804) 786-2116

*(List continued on following page)*



# LIST OF COUNSEL—(Continued)

Counsel for the State of Washington

ROBERT G. RANSOMAN,

Attorney General

JOHN M. RICHARDSON

JOHN R. KATZ

Assistant Attorneys General

Office of the Attorney General

State of Washington

100 Fourth Avenue, Suite 2000

Seattle, Washington 98164

Telephone: (206) 464-6293

Counsel for the State of West Virginia

ROBERT W. TOMPKINS

Attorney General

State Capitol, Room 26-E

Charleston, West Virginia 25305

(304) 340-2021

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In The  
Supreme Court of the United States  
October Term, 1990

SUMMIT HEALTH, LTD., et al.,  
*Petitioners,*  
vs.

SIMON J. PINHAS, M.D.  
*Respondent.*

BRIEF OF RICHARD A. BOLT, M.D.,  
AS AMICUS CURIAE SUPPORTING RESPONDENT

CLARK C. HAVIGHURST  
c/o Duke University  
School of Law  
Science Drive and  
Towerview Road  
Durham, North Carolina 27706  
(919) 684-8152

HAL K. LITCHFORD\*  
KEVIN D. COOPER  
LITCHFORD, CHRISTOPHER &  
MILBRATH, P.A.  
One duPont Centre  
Suite 2200  
P.O. Box 1549  
Orlando, Florida 32802  
(407) 422-6600

\*Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6966  
OR CALL COLLECT (408) 342-2891

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## INTEREST OF THE AMICUS CURIAE

Richard A. Bolt, M.D., is the plaintiff in an antitrust action currently awaiting a second trial in the District Court for the Middle District of Florida. Dkt. No. 82-122-ORL CIV 18. See also *Bolt v. Halifax Hosp. Med. Center*, 891 F.2d 810 (11th Cir.), cert. denied, 110 S. Ct. 1960 (1990). In that proceeding, he alleges (1) an unlawful group boycott by the three hospitals in Daytona Beach, together with certain physicians, to deny him admitting privileges in the community and (2) separate unlawful conspiracies within two of the hospitals to deny him privileges in those institutions. Partly because his burden of proof at the retrial of his Sherman Act case may be adversely affected by this Court's decision in this case, but also out of concern for the public interest, he respectfully submits this brief amicus curiae. Pursuant to Supreme Court Rule 37.3, Dr. Bolt has received the written consent of all Petitioners and Respondent to file this brief. Copies of these consents are submitted herewith.

The Eleventh Circuit currently adheres to a jurisdictional requirement similar to the Ninth Circuit's standard that is challenged by the Petitioners in this case. See *Shahawy v. Harrison*, 778 F.2d 636, 638-41 (11th Cir. 1985). Thus, any stricter jurisdictional standard that this Court may announce in this case would increase Dr. Bolt's burden of proof in the retrial of his case. Dr. Bolt's primary concern, however, is that the scanty pleadings of the Respondent and brief opinion of the court of appeals in this case may not sufficiently demonstrate the importance of maintaining federal antitrust oversight of actions taken by the medical staffs of hospitals. On the basis of personal observation, Dr. Bolt shares the view of many



other knowledgeable observers<sup>1</sup> that medical staffs administering admitting privileges in hospitals regularly use their powers, not to maintain the quality of care, but to restrain trade and to advance other interests of their physician members at the expense of consumers and of the hospitals they purport to serve.

---

### SUMMARY OF ARGUMENT

This case has important implications for the application of section 1 of the Sherman Act, 15 U.S.C. § 1, to concerted acts of competing physicians in hospitals. Although each antitrust suit challenging an action by a hospital medical staff against an individual physician or other health care practitioner may seem insignificant in itself, many relatively minor violations can add up to a serious cumulative injury to interstate commerce. It is submitted that cases like the instant one represent the tip of an iceberg of abuse by physicians of hospital-granted powers and thus have serious implications for interstate commerce and competition in the \$650 billion-a-year health care industry. Because Congress, in passing the Sherman Act, meant to exercise to the fullest possible extent its constitutional power to protect consumers, the Ninth Circuit's test for jurisdiction in hospital staff-privileges cases should be upheld.

The very existence of a combination of physician competitors empowered to decide the fate of other physicians, as well as other issues affecting competition in

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<sup>1</sup> See note 12 *infra*.

their own market, endangers interstate commerce and cries out for federal antitrust scrutiny. The court of appeals acknowledged as much in this case by holding that "[peer-review] proceedings affect the entire staff at Midway [Hospital] and thus affect the hospital's interstate commerce." This holding is consistent with the decisions of this Court because, "as a matter of practical economics," the activities of physicians on hospital medical staffs are "infected" by inherent conflicts of interests and a propensity to restrain trade. The court of appeals was therefore correct in holding that the jurisdictional test in staff-privileges cases should focus on the effects of such "infected" activities and not only on the significance of the individual physician plaintiff who somehow ran afoul of the medical staff.

Claims by hospital and physician interests that the threat of antitrust suits deters responsible peer review and quality assurance in hospitals need not be taken seriously, because a hospital and its medical staff can escape close antitrust scrutiny of their peer-review activities by arranging their joint venture differently. If the decision on staff privileges is genuinely made by the hospital alone – that is, by an entity standing in a vertical market relationship to the physician, rather than by his horizontal competitors –, no real antitrust issue even arises. Even though most plaintiffs will allege that they were victims of a hospital/staff conspiracy, this Court has developed principles for screening such problematical allegations of conspiracy so that they will not deter pro-competitive conduct. Under these principles, a plaintiff's case should be dismissed unless he can offer "evidence that tends to exclude the possibility that [the hospital was] acting independently" in its own commercial interest and not in collusion with its physicians.

As long, however, as decision making in a hospital remains infected by the medical staff's inherent conflict of interests, federal antitrust oversight is needed to ensure that the staff's delegated powers are not being abused at the expense of competitors and consumers. Such oversight should not be blocked by a jurisdictional requirement that focuses only on the effects of the action taken against one individual plaintiff. Consumers have much more at stake in cases of this kind than their interest in the fate of a single competitor.

---

#### ARGUMENT

- I. The jurisdictional test applied by the Ninth Circuit in this case, because it recognizes the pervasive impact of the activities of organized medical staffs in hospitals, fully comports with the "practical-economics" test laid down in decisions of this Court.

Neither the plaintiff's complaint nor the opinion of the court of appeals in this case devotes much space to establishing Sherman Act jurisdiction. Both the plaintiff and the court apparently assumed that the jurisdictional test for antitrust cases challenging actions taken by a hospital medical staff against a single physician competitor was clear and easily satisfied. In opening the issue of jurisdiction for further consideration, this Court should be willing to consider the wide range of considerations, besides those expressly mentioned by the court of appeals, that support jurisdiction in this case. Specifically, the Court should recognize that the organized medical staffs of American hospitals have sweeping responsibilities and powers that unavoidably impact interstate

commerce at many points. This obvious fact, which the court of appeals said "can hardly be disputed," supports the court's conclusion that "[peer-review] proceedings affect the entire staff at Midway [Hospital] and thus affect the hospital's interstate commerce." This Court's decisions concerning the application of the Sherman Act to professional services clearly support finding the requisite jurisdictional nexus in virtually any staff-privileges case.

A major reason why the federal antitrust laws were almost never applied to the so-called "learned professions" prior to this Court's 1975 decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), was that professionals were viewed as being engaged exclusively in localized activities unlikely to affect interstate commerce. In *Goldfarb*, however, the Court held that even highly localized professional services (title searches by attorneys) could be subject to the Sherman Act if they were an essential, integral, and inseparable part of interstate transactions (real estate financing). In *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980), the Court went further still, finding jurisdiction even though the local professional activity involved (real estate brokerage) was not inseparable from the interstate activity it affected. The Court required only that "respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *Id.* at 246, quoting *Hospital Building Co. v. Trustees of Rex Hosp.*, 425 U.S. 728, 745 (1976). Petitioners had only "to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity." 444 U.S. at 242. It was not necessary to

show interstate effects caused by the allegedly illegal conduct itself.

The instant case appears to raise simply the question how the *McLain* test should be applied in cases involving actions taken by organized medical staffs in hospitals against individual physician competitors. Medical staffs occupy such central positions in hospitals, however, that their activities would appear to satisfy even the more stringent *Goldfarb* standard. Thus, the Ninth Circuit's holding in this case might be read as a recognition that a hospital medical staff is "an essential, integral, part of the [hospital enterprise] and inseparable from its interstate aspects." *Goldfarb*, 421 U.S. at 240 (paraphrased). If federal law could reach the localized activities of lawyers that were challenged in *Goldfarb*, there should be no constitutional impediment to applying it to actions of physician organizations taken as agents of hospitals engaged in interstate commerce. Because Congress meant to exercise its constitutional powers to the fullest when it adopted the Sherman Act, *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940), the Ninth Circuit's jurisdictional test for staff-privileges cases should be upheld.

Because this Court focused in *McLain* on the effects of the defendants' allegedly "infected" activities rather than the effects of the specific practices alleged as violations, some courts have suggested that jurisdiction exists in a staff-privileges case if the "general business activities" of the defendant hospital affect commerce.<sup>2</sup> Although this

<sup>2</sup> *Shahawy, supra*, 778 F.2d at 638-41; *Cardio-Medical Assocs. Ltd. v. Crozer-Chester Med. Center*, 721 F.2d 68, 71-76 (3d Cir.

(Continued on following page)

view would probably be defensible as a constitutional matter, the court of appeals in this case did not take such an extreme position.<sup>3</sup> But neither did it focus narrowly, as some courts have done,<sup>4</sup> solely on the impact on interstate commerce of the injury done to the particular physician plaintiff. Instead, the court of appeals took an intermediate position, finding jurisdiction on the basis that the specific activity within the hospital that the plaintiff alleged to be infected by an anticompetitive animus – the activities of the hospital's medical staff in conducting peer review – had a high probability of affecting commerce. This ruling is entirely consistent with *McLain* because Respondent's complaint adequately alleged that an anticompetitive motive and purpose "infected" peer-review activities at Midway Hospital and because, "as a matter of practical economics," those activities inevitably impacted interstate commerce.

(Continued from previous page)

1983); *Hahn v. Oregon Physicians Serv.*, 689 F.2d 840, 844 (9th Cir. 1982). Cf. *Western Waste Serv. Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir. 1980).

<sup>3</sup> It is arguable that, despite some loose dictum, no court has upheld jurisdiction without some basis for believing that the challenged conduct itself would have some effect on the defendant's interstate business. This point is helpfully developed in Respondent's Brief in Opposition to the Petition for a Writ of Certiorari, at 4-10.

<sup>4</sup> E.g., *Stone v. William Beaumont Hosp.*, 782 F.2d 609 (6th Cir. 1986); *Seglin v. Esau*, 769 F.2d 1274, 1279-81 (7th Cir. 1985); *Hayden v. Bracy*, 744 F.2d 1338, 1342-43 (8th Cir. 1984); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 925-28 (2d Cir. 1983); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 720-27 (10th Cir. 1981); *Thompson v. Wise Gen. Hosp.*, 707 F.Supp. 849 (W.D.W. Va. 1989).



- II. Because competition and consumer welfare are in jeopardy whenever combinations of physician competitors exercise the powers of hospitals, the test for Sherman Act jurisdiction in staff-privileges cases must focus on more than the injury suffered by an individual competitor.

Petitioners argue that, in any staff-privileges case, the individual plaintiff should be required to prove that the harm resulting to him as an individual from the alleged violation has significant consequences for interstate commerce.<sup>5</sup> Antitrust law, however, is concerned with "competition, not competitors," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), and therefore should not focus only on the fate of a single individual. The Ninth Circuit's test, acknowledging the anticompetitive hazards and potential for interstate impact inherent in medical staff peer-review actions, is therefore in keeping with antitrust courts' responsibility for protecting consumer welfare. The Ninth Circuit's finding of a nexus with interstate commerce is also supportable because of the special opportunities for abuse that arise when

<sup>5</sup> Although some cases appear to require such proof, see note 4 *supra*, perhaps the best-reasoned statement of the "majority" rule, *Furlong, supra*, indicated that it would be sufficient if the plaintiff had alleged "facts from which it is inferable that the defendants' activities, infected with the particular illegality alleged, are likely to have a substantial effect on commerce." 710 F.2d at 927. Under this approach, allegations that a medical staff was generally infected with an anticompetitive purpose would be sufficient. The Ninth Circuit test simply recognizes the reality that medical staff activities are always infected with such a conflict of interests.

combinations of physicians exercise *de facto* control over professional practice in a hospital. A medical staff that is left free by a hospital to pursue its members' collective interests should certainly not have its actions in individual cases immunized from antitrust scrutiny just because they affect only one competitor at a time.<sup>6</sup>

- A. The organized medical staffs of hospitals are "infected" by conflicts of interests and have both the propensity and many opportunities to restrain trade and interstate commerce. They should therefore be subject, without more, to Sherman Act jurisdiction.

Many essential managerial tasks in hospitals are carried out by competing physicians collaborating under the auspices of an organized medical staff. Ideally, a hospital medical staff would operate as just another administrative arm of the hospital, serving only hospital objectives. Nevertheless, because a typical medical staff operates under its own by-laws, elects its own officers, and appoints its own committees, it is only remotely under the authority of and accountable to the hospital's governing board. Although the hospital board retains the power

<sup>6</sup> See generally Havighurst, "Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships," 1984 Duke L.J. 1071, 1142-44 ("Despite the plausibility of the more demanding view of the jurisdictional requirement in privileges cases, the analysis presented above should point to adoption of the more liberal position. The focus in that analysis on decisionmaking processes in individual hospitals suggests that the relationships to be examined substantively in each case are likely to have repercussions transcending the harm to any particular plaintiff.").

to approve the staff's by-laws and to disapprove particular actions the staff may take, it usually cannot discipline individual physicians directly or appoint officers to exercise direct authority over physicians. A hospital medical staff is thus a unique organization-within-an-organization.<sup>7</sup> Because of its insulation from effective corporate control, it cannot be assumed that its actions consistently and reliably serve the interests of the hospital rather than the collective interests of its members.<sup>8</sup>

Hospitals are internally organized in this unique way, not because the traditional model has been proved superior under all circumstances, but largely because physicians have acted collectively to secure their powerful position in hospitals.<sup>9</sup> The basic organizational model – and especially the crucial requirement of staff “self-governance”<sup>10</sup> – has long been mandated by the accreditation

<sup>7</sup> See *id.* at 1084-92, 1116-22.

<sup>8</sup> For this reason, courts have appropriately held that a medical staff is not such an integral part of the hospital that it is incapable of conspiring with it. *Oksanen v. Page Mem. Hosp.*, 1990-2 Trade Cases (CCH) para. 69,138, at 64,237-38 (4th Cir., Aug. 9, 1990); *Bolt*, 891 F.2d at 819-20; *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988). This Court denied review of the *Bolt* holding on this important point. 110 S. Ct. 1960 (1990). The correct conceptualization is that a hospital and its self-governing medical staff are engaged in a joint venture to operate the facility. See section III *infra*.

<sup>9</sup> See Havighurst, *supra* note 6, at 1087-92.

<sup>10</sup> See, e.g., Joint Commission on Accreditation of Hospitals, Accreditation Manual for Hospitals/1988 at 47-50, 111-29 (1987) (especially Standard MS.2, contemplating a “framework of self-governance,” a phrase that was readopted after being omitted from manuals for 1984 and 1985).

requirements of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), an organization dominated by the three most powerful professional organizations of physicians.<sup>11</sup> This sponsorship has yielded organizational requirements that effectively maintain *de facto* physician authority in hospitals. Although the JCAHO model of the hospital is well accepted – and can be an effective way of enlisting physicians to exercise responsibility for the work of their fellow professionals –, it nevertheless carries many risks to competition. Many commentators have expressed the view that, despite appearances and the observance of legal forms (which the JCAHO's standards also observe), most hospital governing boards have tended to delegate *de facto* decision-making authority on many issues to their medical staffs rather than merely relying on them for advice in exercising responsibility for the care provided in the institution.<sup>12</sup>

<sup>11</sup> See generally Jost, “The JCAH: Private Regulation of Health Care and the Public Interest,” 24 B.C.L. Rev. 835 (1983); Havighurst & King, “Private Credentialing of Health Care Personnel: An Antitrust Perspective” (pt. 2), 9 Am. J.L. & Med. 264, 314-25 (1983) (arguing that the JCAHO should be subject to antitrust scrutiny as a joint venture that monopolizes the supply of authoritative information concerning the quality of hospitals).

<sup>12</sup> E.g., P. Starr, *The Social Transformation of American Medicine* 162-79, 215-32, 428-49 (1982); Blumstein & Sloan, “Antitrust and Hospital Peer Review,” *Law & Contemp. Probs.*, Spring 1988, at 7, 10-24, 90 (“Physicians have exerted great influence on hospital decision making . . . and physicians holding staff privileges have had opportunities to use their power for anticompetitive purposes . . . .”); Havighurst, *supra* note 6, at 1116-22; Note, “Sherman Act ‘Jurisdiction’ in Hospital Staff Exclusion Cases,” 132 U. Pa. L. Rev. 121, 123, 139-41

In deciding this case, this Court must be mindful of the many ways in which a hospital medical staff, when not closely overseen by a hospital governing board, may restrain trade.<sup>13</sup> The most obvious source of antitrust concern is the medical staff's ability to limit the number of competitors in a given specialty by applying unreasonable or discriminatory standards to those whom they desire to exclude or eliminate. Although there may be other hospitals in the community to which an excluded physician could theoretically apply for privileges, a denial at one institution often serves (as Respondent has

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(1983); Kissam, Webber, Bigus & Holzgraefe, "Antitrust and Hospital Privileges: Testing the Conventional Wisdom," 70 Calif. L. Rev. 595, 603-10 (1982); Drexel, "The Antitrust Implications of the Denial of Hospital Staff Privileges," 36 U. Miami L. Rev. 207, 222-224 (1982); Dolan & Ralston, "Hospital Admitting Privileges and the Sherman Act," 18 Hous. L. Rev. 707, 727 (1981); Pauly & Redisch, "The Not-for-Profit Hospital as a Physicians' Cooperative," 63 Am. Econ. Rev. 87 (1973).

<sup>13</sup> Petitioners' simplistic claim that peer review, in general, is "not an economic activity," Brief for Petitioners, at 17-18, is simply erroneous "as a matter of practical economics." Moreover, it is not supported by the congressional committee report cited as its source. H.R. Rep. No. 99-903, 99th Cong., 2d Sess. 3 (1986). The committee's only point was that physicians do not stand to gain economically from engaging in peer review and are therefore easily deterred from engaging in it by fears of antitrust liability. Although it is true that physicians may be deterred from acting aggressively in the face of litigation threats, not all peer review is undertaken purely voluntarily. In hospitals, for example, the duty to participate in peer-review activities arises out of the physician's contract with the hospital and is a responsibility assumed as a quid pro quo for the privilege of admitting patients.

clearly alleged in this case) as a signal to medical staffs at other institutions that an individual is *persona non grata*. Even if the other hospitals are not dominated by their physicians to the same degree, they may reject a physician because of perceived liability risks in accepting someone whose privileges were terminated, whether deservedly or not, at another institution.<sup>14</sup>

A medical staff may also use its disciplinary powers selectively to ensure compliance with expectations unrelated to the hospital's business objectives. Thus, a physician who competes too aggressively must fear retaliation by his professional colleagues, who may decide on this irrelevant ground that there is a need to "review his charts." Physicians may thus be discouraged from advertising, from price cutting, or from cooperating with emergent competitors, such as health maintenance organizations, that threaten the economic interests of incumbent professionals.

Finally, a hospital medical staff can also control the manner in which specific professional services are provided, depriving individual physician competitors of the power to make such decisions independently. Indeed, the assistant-surgeon requirement at Midway Hospital, which the mistreatment of Dr. Pinhas was allegedly designed to enforce, appears to be an excellent illustration of the kind of naked, unjustified restraint of trade

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<sup>14</sup> Hospitals have often been held subject to liability for negligence in permitting physicians with doubtful credentials to practice in their facilities. E.g., *Elam v. College Park Hosp.*, 132 Cal. App. 3d 332, 183 Cal. Rptr. 156 (1982) (citing cases).



that an organized medical staff can impose when a hospital delegates to it powers properly exercised only by the hospital itself.<sup>15</sup> According to the complaint, Dr. Pinhas was able to perform high-quality eye surgery without assistance and sought only to compete by providing a more efficient service. Members of the medical staff, however, had an interest in protecting the income they could earn by serving each other as assistant surgeons. The collectively adopted rule restrained each surgeon's competitive freedom and is thus suspect under the antitrust laws. It is well settled that professional competitors are not free to impose naked horizontal restraints of trade under the rationale that they are ensuring a higher quality of professional services than would be provided under competition. *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

Although hospital medical staffs clearly serve many procompetitive, efficiency-enhancing purposes within hospitals, their activities pose a variety of dangers to competition and interstate commerce. Their actions should therefore be readily open to antitrust scrutiny to ensure either that the hospital has not given its physicians a greater opportunity than necessary to act anticompetitively or that the physicians have not succumbed

<sup>15</sup> The assistant-surgeon requirement appears to have been simply a staff-imposed work rule foreclosing independent decisions by surgeons concerning their need for assistance in particular operations. *But see* note 24 *infra*. Whether or not Dr. Pinhas has adequately pleaded the antitrust offense outlined here and its connection to his case, the probable restraint of trade nicely illustrates the need to look beyond effects on a single plaintiff for the nexus between a physician plaintiff's complaint and interstate commerce.

to the temptation. The actions of hospital medical staffs should not be beyond the reach of the federal antitrust laws simply because a particular action directly affects only one competitor among many in the market. The Ninth Circuit's decision in this case should be upheld because the court adequately recognized as a factual matter and "as a matter of practical economics" the wide variety of harms and far-reaching effects that may flow from actions taken in the name of peer review.

- B. If this Court should decide that a physician plaintiff seeking to establish jurisdiction in a staff-privileges case must show that the specific violation he alleges affected interstate commerce, then only a small effect should suffice because Congress has the power to protect consumers against the predictable cumulative effect of numerous small abuses and the general competition-inhibiting effect that a medical staff's power has on individual physicians even when it is not exercised.

It may be deemed significant that the price-fixing agreements alleged in both *Goldfarb* and *McLain* were per se offenses under the Sherman Act and were consequently unlawful whether or not there was evidence of actual effects on prices or output. It is at least arguable that this fact alone caused this Court not to require the plaintiffs in those cases to prove that the challenged restraints themselves affected interstate commerce.<sup>16</sup>

<sup>16</sup> See *McLain*, 444 U.S. at 242 (plaintiffs "need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates . . .").

Certainly it would have been anomalous to require proof of such effects for jurisdictional purposes when, for good policy reasons,<sup>17</sup> no specific effects had to be proved to establish the substantive violation. Staff-privileges cases, however, typically involve conduct that is condemned only under the Rule of Reason, which does require proof that competition was adversely affected. It therefore might seem reasonable in such cases to require plaintiffs also to allege and prove that the violation charged had some impact on interstate commerce.<sup>18</sup>

If this Court should adopt this line of analysis, it nevertheless should instruct the lower courts that staff-privileges cases should not be summarily dismissed on jurisdictional grounds if the particular offense charged has even a slight effect on interstate commerce. Hospital medical staffs are in a position to exercise their power over individual competitors one at a time, perhaps with small effects in any given case but with effects that are cumulatively significant not only in an individual hospital but across communities. Moreover, a medical staff's direct power over individual physicians can inhibit their competitiveness in many ways even when it is not exercised. For these reasons, the court of appeals was correct in basing jurisdiction on the nexus that inevitably exists

<sup>17</sup> See, e.g., *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (explaining policy rationale for per se rules).

<sup>18</sup> Such reasoning appears to have been the basis for dismissing the complaint in the *Furlong* case, *supra*. See note 5 *supra*. Although there is a question in this case whether Dr. Pinhas has made sufficient allegations in this regard, he did allege that he was substantially engaged in interstate commerce and was a victim of an anticompetitive conspiracy.

between the actions of a hospital medical staff and interstate commerce.

In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the plaintiff's insignificance and failure to allege any general "public harm" were no bar to finding that a substantive violation had been sufficiently alleged. (Jurisdiction was not an issue.) The Court stated that a group boycott "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Id.* at 213. The point is well taken, not because antitrust law is designed to protect small business, but because true group boycotts of the kind alleged in *Klor's* are naked restraints that deprive "the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 769 (1984). Although a simple denial of staff privileges in a single hospital is generally not a true boycott deserving similar per se treatment, the potential harm to competition that exists whenever horizontal competitors repeatedly make decisions affecting the fate of other competitors should be enough to establish federal jurisdiction in virtually any case brought by an individual victim.<sup>19</sup>

<sup>19</sup> For examples of cases that would probably warrant dismissal on jurisdictional grounds even under the test suggested here, see *Stone, supra*, and *Sarin v. Samaritan Health Center*, 813 F.2d 755 (3d Cir. 1987).



III. Rather than applying an overly restrictive jurisdictional test, federal courts can deal effectively with nonmeritorious antitrust challenges to hospital actions with respect to staff privileges by applying familiar legal tests for screening allegations of conspiracy and for appraising the operation of procompetitive joint ventures.

An important part of Petitioners' argument is that physicians and hospitals are discouraged from conducting desirable peer review out of fear of incurring heavy expenses in antitrust litigation whether or not they are held liable for treble damages. Although this argument raises a legitimate concern,<sup>20</sup> it proves too much. In addition to downplaying the pervasive threat to competition posed by organized medical staffs, it ignores other means by which lower courts can quickly dispose of nonmeritorious antitrust cases. This is not the only area in which antitrust law must avoid deterring procompetitive behavior while still policing unlawful conduct. Established principles already specifically address the problem

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<sup>20</sup> Indeed, Congress has itself expressed this concern in the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq.* That legislation, however, leaves hospitals and medical staffs open to antitrust suits for anticompetitive acts, thus showing Congress' awareness of the harms that may be done to competition in the name of peer review. Congress' approach to the problem was not to amend the antitrust laws but to impose pro-defendant fee-shifting in cases where certain conditions protective of competition were met and the action was clearly frivolous. This legislation does not relieve antitrust courts of the need to evolve principles for the just and expeditious handling of these cases.

of unsupportable allegations of vertical or horizontal conspiracy that can be leveled at both procompetitive unilateral conduct and procompetitive joint ventures. These principles allow easy resolution of those staff-privileges cases that challenge hospital actions that truly pose no danger to competition.

This Court has developed a specific test for evaluating pleadings and evidence in cases in which a problematic conspiracy is alleged. In *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the Court considered whether dealer complaints to a manufacturer concerning the plaintiff's price cutting – which complaints were followed by the plaintiff's termination – were enough evidence of a vertical price-fixing conspiracy to allow the case to be submitted to the jury. Noting the importance of not chilling a manufacturer's unilateral implementation of a procompetitive marketing strategy employing non-price restrictions on its dealers, the Court required plaintiffs to produce evidence that is truly probative of an actual conspiracy: "There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated dealers were acting independently." *Id.* at 764. The Court subsequently employed this formula in approving summary judgment for the defendants in *Matsushita Elec. Indust. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 579 (1986), where it also stated that "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support an inference of conspiracy." *Id.* at 588.

Lower courts are thus well equipped to dispose of antitrust staff-privileges cases on the merits whenever the plaintiff fails to offer evidence that "tends to exclude the



possibility" that the hospital, in taking action against the plaintiff, acted independently in its own interest and not in collusion with its physicians. For example, a plaintiff physician might be required to show, in addition to routine cooperation and communication between the hospital and its medical staff, some reason to doubt that the action taken furthered the hospital's commercial interests (other than by conferring an anticompetitive benefit on physicians).<sup>21</sup> On the other hand, a hospital that could satisfactorily demonstrate that its governing board did in fact take conscientious, independent action having a rational relation to a legitimate corporate interest of the institution – as opposed to merely rubber-stamping a decision of its medical staff – should be shielded from antitrust attack.<sup>22</sup> Under this well-precedented approach, costly discovery and trials would be necessary only if the hospital could not demonstrate that it had not allowed a combination of competitors to act in its stead on matters having grave significance for competition. This Court, in

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<sup>21</sup> Actions that would be against a party's apparent self-interest in the absence of a conspiracy are a classic tip-off that a conspiracy is afoot. See *Theater Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541-42 (1954); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445-47 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

<sup>22</sup> There is a debate among scholars as to the level of antitrust scrutiny to be given to the alleged substantive basis for a hospital's actions. Compare Blumstein & Sloan, *supra* note 7, with Havighurst, *supra*, note 1, at 1125-39, 1157 n.281 (recommending "limited scrutiny" and a kind of "rational basis" test for action that is clearly unilateral; stressing costliness and deterrent effect of fuller inquiry).

order to respond to legitimate concerns about the high costs of litigating staff-privileges cases, could usefully encourage trial courts to use their authority under Fed. R. Civ. P. 26(d), (f), and 56(f) to limit discovery to the threshold issue of hospital independence until the plaintiff has made a sufficient showing.

Thus, lower courts should be able to dispose of many staff-privileges cases quickly and cheaply (and accurately) without resorting to the expedient of a jurisdictional test that requires a plaintiff to prove the full extent of a conspiracy of which he may not be the only victim. In addition, a rule that exposes to strict, and inevitably costly, antitrust scrutiny only those hospitals that allow physicians to exercise powers properly belonging to the hospital governing board would create a strong incentive for hospital boards to exercise their proper authority and for medical staffs to subordinate themselves to that authority. Such a rule would minimize the risks to competition that inevitably arise when physicians exercise *de facto* control of hospitals. It would also effectively answer hospital and physician complaints that the law deters procompetitive peer review by exposing them to unavoidable litigation costs and unpredictable liability risks.

The Rule of Reason applicable to procompetitive joint ventures supplies additional opportunities for lower courts to screen staff-privileges cases for substantive merit. There are, in reality, two distinct joint ventures present in these cases. Not only is the medical staff a combination of competing physicians, whose actions are subject to the Sherman Act, *Bolt*, 891 F.2d at 819; *Weiss v. York Hosp.*, 745 F.2d 786, 816-17 (3d Cir. 1984), *cert. denied*,

470 U.S. 1060 (1985), but the collaboration between the medical staff and the hospital can itself be characterized as a joint venture.<sup>23</sup> Both joint ventures have strong pro-competitive, efficiency-enhancing rationales, however, allowing even actions adversely affecting competition to be justified if they serve significant business interests of the hospital.<sup>24</sup> Because the Rule of Reason supplies tools helpful in distinguishing anticompetitive abuses from reasonable ancillary restraints, lower courts, by screening the pleadings and proof in staff-privileges cases, can quickly dismiss many nonmeritorious cases.<sup>25</sup>

<sup>23</sup> See note 8 *supra*.

<sup>24</sup> For example, the anticompetitive assistant-surgeon requirement at Midway Hospital revealed in Dr. Pinhas's complaint (see text at note 15 *supra*) might be defended as a hospital rule that, although maintained on the advice of the medical staff, constituted a procompetitive vertical – rather than an anticompetitive horizontal – restraint. Nevertheless, although it is an issue for trial, it is hard to imagine what business reason the hospital might have had for maintaining such a rule except as a “cat’s paw” for its medical staff. Cf. *Valley Liquors v. Renfield Importers, Ltd.*, 678 F.2d 742, 743 (7th Cir. 1982) (supplier induced by distributors to impose a vertical restraint solely for their benefit described by Posner, J., as their “cat’s paw”). A possible reason for allowing physicians to operate a cartel on the hospital’s premises would be to induce physicians to admit more patients. Such a purpose would be no defense for a vertical conspiracy, however. Incidentally, hospital payments to Dr. Pinhas under the alleged sham consulting contract, being intended to induce referrals of Medicare patients, would violate Medicare fraud and abuse legislation, 42 U.S.C. § 1320a-7b(b).

<sup>25</sup> An essential element in a case under the Rule of Reason is market power. If the hospital is one of many in the market, it

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One principle that has proved valuable in evaluating arguable ancillary restraints of trade adopted by powerful joint ventures is the requirement that the parties design and operate their venture in ways that minimize the hazards to competition that their collaboration creates. In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), a powerful combination of competitors engaged in statutorily authorized self-regulation (similar to medical peer review) was held to have violated the Sherman Act in disciplining a competitor without employing fair procedures (which would have minimized the opportunity for anticompetitive abuse). See also *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1369-87 (5th Cir. 1980) (applying less-restrictive-alternative principle to multiple listing service). At a minimum, the less-restrictive-alternative principle applicable to the potentially procompetitive collaboration between a hospital and its medical staff requires close scrutiny of all competition-endangering actions taken by the medical staff as the hospital’s agent. Cf. *American Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570-74 (1982) (professional association engaged in product certification held liable for antitrust

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is not clear that the medical staff, by excluding a competitor, can affect the supply of medical services in the market, because the excluded physician may find another institution in which to practice. See *Robinson v. Magovern*, 521 F. Supp. 842 (W.D. Pa. 1981); Havighurst, *supra* note 6, at 1111-16 (focusing on whether hospital is an “essential facility”). But see text at notes 14-15 *supra*. By insisting on an early demonstration of the likelihood of market power in a Rule of Reason case, courts can terminate many cases that have no adverse implications for consumer welfare.



violations committed by its voluntary agents). If a hospital can make a satisfactory showing, however, that a particular action affecting competition was its own independent act, taken for legitimate business reasons and not on behalf of or in concert with its physicians, cases should be subject to rapid dismissal. Although scholars differ as to how much of a showing a hospital should be required to make, *see note 22 supra*, there is ample opportunity for lower courts to protect conscientious hospitals serving consumer interests from unwarranted burdens in defending their actions on staff-privileges matters.

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## CONCLUSION

This Court has in this case another opportunity – similar to the one it seized in *Patrick v. Burget*, 486 U.S. 94 (1988) – to prevent antitrust challenges to the anticompetitive acts of hospital medical staffs from being blocked at the courthouse door. In view of the conflict of interests that infects organized physician groups in dealing with issues affecting competition in medical care, it would be inappropriate to focus the jurisdictional inquiry in staff-privileges cases only on the significance or insignificance of the individual plaintiff. As the Ninth Circuit found, there is a high probability that “peer-review proceedings have an effect on interstate commerce.”

Respectfully submitted,

CLARK C. HAVIGHURST  
c/o Duke University School of Law  
Science Drive and Towerview Road  
Durham, North Carolina 27706

HAL K. LITCHFORD\*  
KEVIN D. COOPER  
LITCHFORD, CHRISTOPHER &  
MILBRATH, P.A.  
One duPont Centre  
Suite 2200  
P.O. Box 1549  
Orlando, Florida 32802  
\*Counsel of Record